Indiana Law Review

Volume 17 No. 2 1984

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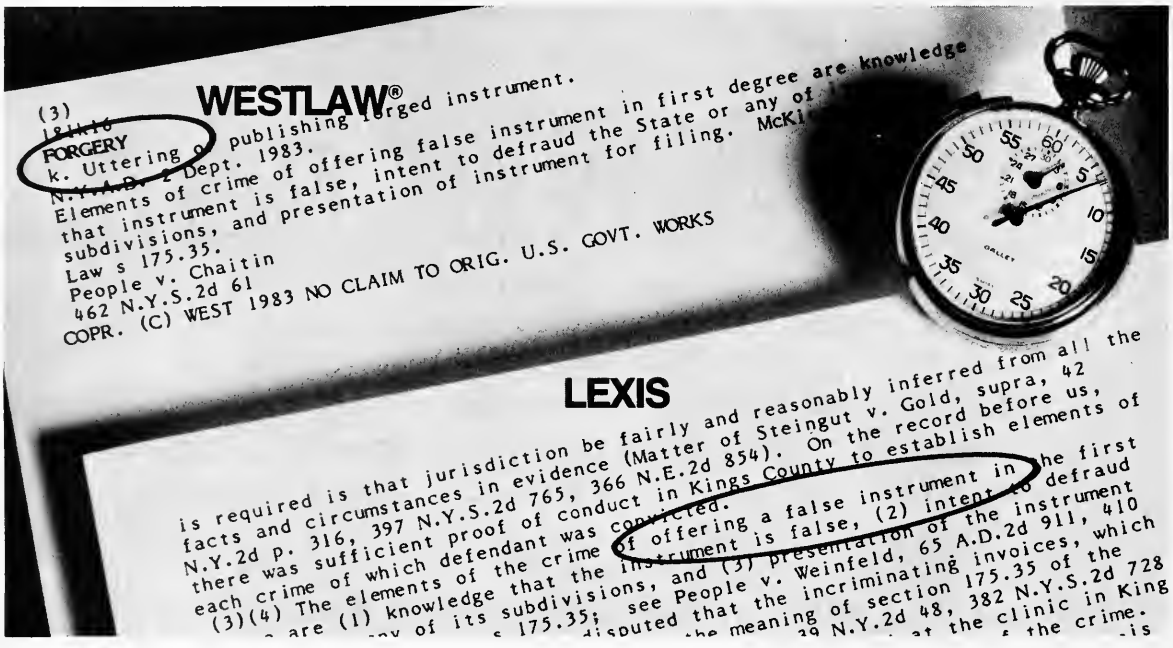

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Indiana Law Review

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Volume 17 1984

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Indiana Law Review

Volume 17 1984 Number 2

The "Negotiable" Non-Negotiable Instrument: A Vagary of Indiana Commercial Law

HAROLD GREENBERG*

I. INTRODUCTION

A little known or remembered feature of the Indiana law of commercial paper is the existence, since the early days of statehood, of a form of commercial paper which may be called the "negotiable non-negotiable instrument." This instrument is still viable today as a consequence of the legislature's failure to repeal chapter 75 of the Acts of 1861 (1861 Act)[1] when it enacted the Uniform Negotiable Instruments Law (NIL) in 1913[2] and the Uniform Commercial Code (UCC) fifty years later in 1963.[3]

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[1]Act of Mar. 11, 1861, ch. 75, 1861 Ind. Acts 145 (currently codified at IND. CODE §§ 26-2-3-1 to -14 (1982)). Following its enactment in 1861, the Act was codified at various locations in the subsequent editions of the Indiana Code: §§ 5501 to 5518 (1881); §§ 7515 to 7532 (Burns 1894); §§ 9071 to 9089 (Burns 1908); §§ 11342 to 11359 (Burns 1926); §§ 19-1901 to 19-1918 (Burns 1950). The full title of the Act is:

> An Act concerning promissory notes, bills of exchange, bonds, or other instruments in writing, signed by any person who promises to pay money or acknowledges money to be due, or for the delivery of any specific article, or to convey property, or to perform any stipulation therein mentioned, and repealing all laws coming in conflict therewith.

Citations in this article to the 1861 Act will be to the Act's current codification in the 1982 Indiana Code.

[2]Uniform Negotiable Instruments Law, ch. 63, 1913 Ind. Acts 120 [hereinafter referred to as the NIL]. The Uniform Commercial Code (UCC) expressly repealed the NIL, *see* IND. CODE § 26-1-10-102(1) (1982); however, prior to being superseded by the UCC, the NIL had been adopted in every state. *See* UNIF. NEGOTIABLE INSTRUMENTS ACT Table III, 5 U.L.A. x (1943).

[3]Uniform Commercial Code, ch. 317, 1963 Ind. Acts 539 (current version codified at IND. CODE §§ 26-1-1-101 to 26-1-10-106 (1982)). All references to the UCC and its official comments shall be to the official UCC section numbers, i.e., U.C.C. §§ 1-101 to 10-106 (West 1978), not to the Indiana Code section numbers. The official comments to the UCC can also be found in West's Annotated Indiana Code following the appropriate sections of the UCC as adopted in Indiana.

This Article compares the significant characteristics of such instruments with those of negotiable and other instruments governed by Article 3 of the UCC. The principal focus will be upon claims of title, defenses and set-offs, and the liability of indorsers and accommodation parties. Because of some noteworthy differences between the 1861 Act and the UCC in some of these areas, the 1861 Act may provide a useful tool for practitioners who are aware of its provisions. At the same time, it may create a trap for those who are not. The author concludes that the 1861 Act should be completely revised so as to make transfer of non-negotiables consistent with UCC-controlled transfers.

II. Background

A. The Existence of Negotiable Non-Negotiable Instruments

When Indiana adopted the UCC, Article 3 of which replaced the NIL,[4] one of the expressly declared purposes was "to simplify, clarify and modernize the law governing commercial transactions."[5] Despite this declaration, the legislature repealed the 1861 Act only insofar as it was inconsistent with the UCC.[6] That the 1861 Act and the UCC can co-exist is clear from both the UCC itself, which declares that the general principles of law and of the law merchant supplement the UCC's provisions,[7] and the official comments, which acknowledge the existence of statutes such as the 1861 Act as well as the commercial paper created thereby.[8] In addition to declaring certain promissory notes to be fully negotiable under the law merchant, the 1861 Act imparted to practically all written promises not negotiable under the law merchant some of the characteristics attributed to negotiability.[9] This created a class of instruments which may be described as "negotiable non-negotiable instruments."

B. Negotiable Instruments, the Law Merchant, and Related Concepts

It is important at this point to clarify the meaning of the terms to be used in this Article. The UCC uses "negotiable" and "instrument"

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[4]*See* U.C.C. § 10-102(1); *id.* § 3-101 official comment (stating that Article 3 "represents a complete revision and modernization of the Uniform Negotiable Instruments Law").

[5]*Id.* § 1-102(2)(a).

[6]*Id.* § 10-102(3).

[7]*Id.* § 1-103.

[8]*Id.* § 3-104 official comment. One commentator observed that in view of the uniformity sought by the NIL and its strict requirements for negotiability, the 1861 Act must have been repealed by implication. *See* Culp, *Negotiability of Promissory Notes Payable in Specifics*, 9 Miss. L.J. 277, 278-80 (1937). The Indiana cases, however, prove the contrary and show that the 1861 Act coexisted with the NIL and gave some characteristics of negotiability to promissory notes not meeting the NIL's requirements for negotiability. *See* Guio v. Lutes, 97 Ind. App. 157, 184 N.E. 416 (1933); Smith v. Zabel, 86 Ind. App. 310, 157 N.E. 551 (1927).

[9]Ind. Code §§ 26-2-3-1, -6 (1982).

interdependently so that "instrument" is defined as "a negotiable instrument."[10] A "negotiable instrument" is itself strictly limited to drafts, checks, notes, and certificates of deposit which comply with the specific requirements of UCC section 3-104 and the sections immediately following.[11]

UCC section 3-805 also refers to an "otherwise negotiable" instrument as a draft, check, note, or certificate of deposit which complies with all of the requirements of UCC section 3-104 except that it lacks the words of negotiability, "payable to order or to bearer."[12] The UCC's official comments speak of this instrument as "*the* non-negotiable instrument,"[13] as if it were the only paper to be so designated, and state further that such a " 'non-negotiable instrument' is treated as a negotiable instrument, so far as form permits,"[14] but there can be no holder in due course of such an instrument.[15]

Falling somewhere between the UCC's negotiable instrument and its "otherwise negotiable" instrument is the negotiable instrument which is overdue when it comes into the hands of a new holder. Although such an instrument satisfies *all* of the UCC's requirements for negotiability, the fact that it is overdue when negotiated, a fact which appears on its face, precludes the new holder from being a holder in due course.[16]

Any other paper which for any reason fails to satisfy section 3-104 or 3-805 is not a "non-negotiable instrument" for UCC purposes,[17] and "is entirely outside the scope of [Article 3] and [is] to be treated as a

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[10]U.C.C. § 3-102(1)(e).

[11]*Id.* § 3-104(1). This subsection states that for a writing to be a negotiable instrument within Article 3 it

> must (a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay a sum certain in money and no other promise . . . except as authorized by [Article 3]; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer.

Sections 3-105 to 3-119 further refine or explain the general requirements of § 3-104.

[12]*Id.* § 3-805.

[13]*Id.* § 3-805 official comment (emphasis added).

[14]*Id.*

[15]*Id.* § 3-805 & official comment. Professor Beutel lamented that this section, then numbered 3-705, "creates a new technical term, 'non-negotiable instrument' which now becomes subject to all the rules of the Article [3] except that nobody can be a holder in due course." He continued that "no practical advantage seems to have been gained by creating this uncommon type of 'non-negotiable instrument.' " Beutel, *Comparison of the Proposed Commercial Code, Article 3, and the Negotiable Instruments Law*, 30 NEB. L. REV. 531, 556-57 (1951). *See generally* Note, *Liabilities of the Transferor of Non-Negotiable Instruments under the Proposed Commercial Code*, 98 U. PA. L. REV. 213 (1949).

[16]*See* U.C.C. § 3-302. It should be noted that the transferee of an overdue negotiable instrument may have the rights of a holder in due course pursuant to the UCC's shelter rule, *id.* § 3-201, if his transferor was a holder in due course. The shelter rule cannot protect the holder of an otherwise negotiable instrument whose transferor could not have been a holder in due course.

[17]*See id.* § 3-104 official comment 1.

simple contract."[18] Subsection 3-104(3) does state that "the terms 'draft,' 'check,' 'certificate of deposit' and 'note' may refer to instruments which are not negotiable within this Article as well as to instruments which are so negotiable,"[19] but the official comment to this subsection refers directly to section 3-805, thereby indicating that the "instruments" which are not negotiable in UCC parlance are the "otherwise negotiable" instruments of section 3-805.[20] The official comments do concede, however, that there are state statutes older than the UCC which make other promises "negotiable" and that such statutes may continue to apply to paper not controlled by the UCC.[21] The 1861 Act is such a statute.

The UCC's requirements for negotiability are essentially the same as those extant under the law merchant of the last century,[22] the UCC being a "complete revision and modernization of the Uniform Negotiable Instruments Law,"[23] itself a codification of the law merchant.[24]

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[18]*Id.* § 3-805 official comment.

[19]*Id.* § 3-104(3).

[20]*See id.* § 3-104 official comment 6 ("Subsection (3) is intended to make clear the same policy expressed in Section 3-805.").

[21]*Id.* § 3-104 official comment 1.

[22]For a promissory note to be negotiable at common law pursuant to the law merchant, certainty was required as to (1) the persons entitled to be paid the money (order or bearer), (2) the payors and the conditions of their liability, (3) the amount, (4) the time of payment, and (5) the fact of payment. 1 T. PARSONS, A TREATISE ON THE LAW OF PROMISSORY NOTES AND BILLS OF EXCHANGE 30 (1873). *See, e.g.*, Glidden v. Henry, 104 Ind. 278, 279-80, 1 N.E. 369, 370-71 (1885) (quoting PARSONS); Walker v. Woollen, 54 Ind. 164, 166 (1876) ("A note, in order that it be negotiable in accordance with the law merchant, must be payable unconditionally and at all events, and at some fixed period of time, or upon some event which must inevitably happen."); Nicely v. Commercial Bank, 15 Ind. App. 563, 565, 44 N.E. 572, 573 (1896) (A negotiable promissory note must have on its face "(1) a date; (2) an unconditional promise to pay money; (3) a fixed time for payment; (4) a definite amount to be paid; (5) a place where payment is to be made."). *Accord* Nicely v. Winnebago Nat'l Bank, 18 Ind. App. 30, 41, 47 N.E. 476, 479 (1897) (repeating, without citation, the classic phrase from Overton v. Tyler, 3 Pa. 346, 347 (1846), that a negotiable instrument must be a " 'courier without luggage' "). Compare the language of UCC 3-104(1), *supra* note 11, which is substantially similar to the law merchant's requirements for negotiability.

[23]U.C.C. § 3-101 official comment.

[24]Paxton v. Miller, 102 Ind. App. 511, 513-14, 200 N.E. 87, 88 (1936); Beutel, *Problems of Interpretation Under the Negotiable Instruments Law*, 27 NEB. L. REV. 485, 503 (1948); Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1069-70 (1954) [hereinafter cited as *Good Faith Purchase*]; Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 613 (1981) [hereinafter cited as *Confessions*]. It is highly unlikely that an instrument which would have been negotiable under the law merchant will not today meet the UCC's requirements for negotiability. The converse is not necessarily true, and it is possible for a note negotiable under the UCC to fail to have satisfied the requirements for negotiability under the law merchant. *See, e.g.*, South Whitley Hoop Co. v. Union Nat'l Bank, 53 Ind. App. 446, 101 N.E. 824 (1913) and cases cited therein, holding that a provision for payment "with exchange" rendered uncertain the respective amounts payable and destroyed the negotiability of the instruments involved. Under the UCC, identical language has no effect on negotiability. *See* U.C.C. § 3-106(1)(d). Similarly, although a note containing

The 1861 Act uses "instrument" in its very broadest sense to mean practically any written undertaking, whether in the form of a note, draft, acknowledgement of debt, or promise to perform an act.[25] Furthermore, the 1861 Act uses "negotiable" far more broadly than either the UCC or the law merchant so that all such "instruments" are "negotiable by endorsement thereon, so as to vest the property thereof in each endorsee successively."[26]

Unless the context otherwise requires, this Article will use "instrument" to mean any promissory note, draft, check, certificate of deposit, or other obligation to pay money, whether or not it is negotiable under the UCC or the law merchant. A "non-negotiable instrument" will mean one which is not negotiable under the UCC or the law merchant. A "negotiable instrument" is one which is fully negotiable under the law merchant, and therefore also negotiable under the UCC. An "otherwise negotiable" instrument is one which satisfies all of the UCC's requirements for negotiability except for the absence of the words of negotiability, "payable to order or to bearer."[27] An "overdue negotiable instrument" is an instrument which satisfies the UCC's requirements for negotiability but is already overdue when acquired by the current holder.

C. The Provisions of the 1861 Act

The 1861 Act has been characterized as "the Indiana version of the Statute of Anne."[28] The reasoning given for the adoption of the Act and its predecessors[29] was that until the enactment of the Statute of Anne in 1704,[30] bills of exchange (today more commonly called drafts)[31] were

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a provision which permits the holder to extend the time for payment was not negotiable as a bill of exchange under the law merchant, *see, e.g.*, Glidden v. Henry, 104 Ind. 278, 281, 1 N.E. 369, 371 (1885), such a note is negotiable under the UCC. *See* U.C.C. § 1-309(1)(d).

[25]IND. CODE § 26-2-3-1 (1982). *See infra* note 36. *See, e.g.*, Magic Packing Co. v. Stone-Ordean Wells Co., 158 Ind. 538, 64 N.E. 11 (1902) (contract to sell cases of canned apples); Johnson School Township v. Citizens Bank, 81 Ind. 515 (1882) (document which stated "there is due . . . and payable a sum for school furniture" but contained no express words of promise); Craig v. Encey, 78 Ind. 141 (1881) (appeal bond); Drake v. Markle, 21 Ind. 433 (1863) (certificate of deposit); Mewherter v. Price, 11 Ind. 199 (1858) (contract to deliver hogs). *But cf.* McCurdy v. Bowes, 88 Ind. 583 (1883) (completely ignoring the 1861 Act and failing to apply it to an insolvent corporation's certificate of indebtedness which acknowledged money to be due).

[26]IND. CODE § 26-2-3-1 (1982).

[27]U.C.C. § 3-805.

[28]H. PRATTER & R. TOWNSEND, INDIANA UNIFORM COMMERCIAL CODE WITH COMMENTS § 3-805 comments (1963) [hereinafter cited as PRATTER & TOWNSEND]. *See* Bullitt v. Scribner, 1 Blackf. 14, 14-15 (Ind. 1818).

[29]*See, e.g.*, Act of Jan. 29, 1818, ch. 37, 1818 Ind. Acts 232 (substantially similar to the 1861 Act); Reid v. Ross, 15 Ind. 265 (1860).

[30]3 & 4 ANNE, ch. 9, § 1 (1704) (entitled "An act for giving like remedy upon promissory notes, as is now used upon bills of exchange, and for the better payment of inland bills of exchange.").

[31]*See* U.C.C. § 3-104(2)(a).

negotiable at common law, which included the law merchant, but promissory notes were not negotiable.[32] Further, since Indiana's adoption of the common law of England related back to 1607 and incorporated nothing of English law after that date, the Statute of Anne never became the law of Indiana.[33] Thus, according to such reasoning, promissory notes in Indiana could be made negotiable only pursuant to an act of the legislature.[34]

Unlike the Statute of Anne, which dealt only with promissory notes,[35] the 1861 Act declared four distinct categories of written instruments to be negotiable: (1) obligations to pay money, whether promised or acknowledged to be due; (2) promises to deliver specific articles; (3) promises "to convey property"; and (4) promises "to perform any stipulation" contained in the writing.[36] The form could be that of a promissory note, bill of exchange, bond, or "other instrument in writing."[37]

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[32]Holloway v. Porter, 46 Ind. 62, 64-66 (1874); Mix v. State Bank, 13 Ind. 521, 521-23 (1859); Bullitt v. Scribner, 1. Blackf. 14, 14-15 (Ind. 1818).

[33]Holloway v. Porter, 46 Ind. 62, 64-66 (1874); Mix v. State Bank, 13 Ind. 521, 521-23 (1859); Bullitt v. Scribner, 1 Blackf. 14, 14-15 (Ind. 1818).

[34]Holloway v. Porter, 46 Ind. 62, 64-66 (1874); Mix v. State Bank, 13 Ind. 521, 521-23 (1959); Bullitt v. Scribner, 1 Blackf. 14, 14-15 (Ind. 1818). *Cf.* J. BYLES, A TREATISE OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES AND CHECKS 15 (6th Am. ed. 1874); J. CHITTY & J. HULME, A PRACTICAL TREATISE ON BILLS OF EXCHANGE, CHECKS ON BANKERS, PROMISSORY NOTES, BANKERS' CASH NOTES, AND BANK NOTES 517-18 (10th Am. ed. 1842); 2 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 383-86 (1906). The proposition that promissory notes were not negotiable until enactment of the Statute of Anne, as stated in the foregoing cases, has been under attack for many years and is probably incorrect. *See* 5 U.S. (1 Cranch) app. note (A) 367-75 (1804); C. NORTON, HANDBOOK ON THE LAW OF BILLS AND NOTES 7-8 (4th ed. 1914); J. STORY, COMMENTARIES ON THE LAW OF PROMISSORY NOTES § 6 (1845); Aigler, *Commercial Instruments, The Law Merchant, and Negotiability*, 8 MINN. L. REV. 361, 366-68 (1924); Reed, *The Origin, Early History, and Later Development of Bills of Exchange and Certain Other Negotiable Instruments*, 4 CAN. B. REV. 665, 678 (1926); Notes and Comment, *Bills and Notes: Non-negotiable Notes: Presumption of Consideration*, 9 CORNELL L.Q. 182, 184 (1924). The more accurate position is that promissory notes were negotiable under both the law merchant and the common law and that the Statute of Anne was a Parliamentary declaration of the common law in direct response to several then recent decisions of Lord Holt to the contrary. *Cf.* Holdsworth, *The Origins and Early History of Negotiable Instruments. IV*, 32 LAW Q. REV. 20, 32-36 (1916), in which the author is somewhat more sympathetic to Lord Holt's position on the matter.

[35]3 & 4 ANNE, ch. 9 (1704).

[36]IND. CODE § 26-2-3-1 (1982). The precise language is:

> All promissory notes, bills of exchange, bonds or other instruments in writing, signed by any person who promises to pay money, or acknowledges money to be due, or for the delivery of a specific article, or to convey property, or to perform any stipulation therein mentioned, shall be negotiable by endorsement thereon, so as to vest the property thereof in each endorsee successively.

[37]*Id.* It has been suggested that statutes declaring written promises other than those to pay money to be negotiable were enacted by states "perhaps because of a primitive financial

In a manner similar to the Statute of Anne, the 1861 Act made promissory notes negotiable, as were bills of exchange under the law merchant, but expressly limited such negotiability to promissory notes payable to order or bearer *in an Indiana* bank,[38] a limitation which had no counterpart in the Statute of Anne.[39] Consequently, to be negotiable under the law merchant in Indiana, a promissory note was required to be payable in an Indiana bank *and* to possess all of the strict requirements for negotiability imposed by the law merchant.[40] Any other note was negotiable only within the terms of the Act.

The 1861 Act provided further that the assignee may bring suit in his own name against the maker,[41] but the maker may assert against the assignee any "defense or set-off" which the maker may have had against any prior assignee or the payee before notice of the assignment.[42] The assignee could also pursue any indorser, but only after using "due diligence" to collect from the maker.[43] In such a suit against a prior indorser, the prior indorser could raise any defense he might have had against his immediate assignee.[44] Promissory notes payable at an Indiana bank were made negotiable as bills of exchange[45] and were not governed by these statutory provisions because the 1861 Act expressly stated that it did not modify the law applicable to bills of exchange, namely, the law merchant.[46]

Since the UCC, by its terms, applies to the negotiable instrument or otherwise negotiable instrument as defined in Article 3,[47] and as previously defined by the law merchant,[48] it is clear that the portion of the 1861

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system or for other reasons connected with their local economy." Culp, *supra* note 8, at 277. *Accord* U.C.C. § 3-104 official comment 1.

[38]IND. CODE § 26-2-3-6 (1982) ("Notes payable to order or bearer in a bank in this state shall be negotiable as inland bills of exchange, and the payees and endorsees thereof may recover as in the case of such bills.").

[39]*See* Mix v. State Bank, 13 Ind. 521 (1859).

[40]*See* IND. CODE § 26-2-3-6 (1982). *See supra* note 38 and accompanying text.

[41]IND. CODE § 26-2-3-2 (1982).

[42]*Id.* § 26-2-3-3 ("Whatever defense or setoff the maker of any such instrument had, before notice of assignment, against an assignor, or against the original payee, he shall have also against their assignees").

[43]*Id.* § 26-2-3-4. For a discussion of due diligence, see *infra* notes 152-69 and accompanying text.

[44]The language of Indiana Code section 26-2-3-4 creates an ambiguity by the use of the words "he shall have any defense" with no clear indication as to which party the "he" refers. Initially, it would appear that "he shall" should be read as parallel to "[a]ny such assignee . . . shall." IND. CODE § 26-2-3-4 (1982). However, the only party who logically would be asserting a defense against his immediate assignee is the remote indorser-defendant, not the current assignee-plaintiff.

[45]*Id.* § 26-2-3-6.

[46]*Id.* § 26-2-3-5.

[47]*See supra* notes 10-18 and accompanying text.

[48]*See supra* notes 22-24 and accompanying text.

Act which made promissory notes payable at an Indiana bank negotiable pursuant to the law merchant[49] has been repealed. However, the non-negotiable instrument, as here defined, is entirely outside the scope of the UCC and therefore remains subject to the 1861 Act.

At this point, one should note that the major distinctions between non-negotiable paper, absent any applicable statute such as the 1861 Act, and paper negotiable under the law merchant, the NIL, and UCC have been characterized as (1) the requirement that a transferee of non-negotiable paper, even if he takes in good faith, for value, and without notice of claims or defenses, must notify the obligor of the transfer in order to cut off defenses subsequently acquired by the obligor, such notification not being required of a holder in due course of negotiable paper; (2) the power of the holder of negotiable paper to transfer free of equities and defenses, a power not possessed by the transferor of non-negotiable paper; and (3) the presumption of consideration in the case of negotiables, which does not exist in the case of non-negotiables.[50] The 1861 Act and the cases decided under it have blurred or eliminated some of these distinctions.

III. Significant Features of Negotiable and "Negotiable" Non-Negotiable Instruments

Three of the major issues relating to any instrument are (1) the effect of the vesting of property in the instrument as a consequence of indorsement, (2) the nature and extent of the defenses or set-offs available to the maker or drawer or to a remote indorser in an action by the current holder, and (3) the nature and extent of the liability of indorsers in the chain of title.

A. The Effect of Indorsement on Title and Claims to the Instrument

The holder in due course of a negotiable instrument has been characterized as a "superplaintiff,"[51] an appropriate characterization because he takes free of *all* claims and most defenses under both the UCC[52] and the law merchant.[53] The UCC's other holder, the holder not in due course, is not as fortunate because he takes subject to all claims and

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[49]Ind. Code § 26-2-3-6 (1982).

[50]*See* Goodrich, *Non-Negotiable Bills and Notes*, 5 Iowa L. Bull. 65, 67 (1920).

[51]J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 14-1 (2d ed. 1980) [hereinafter cited as White & Summers].

[52]*See* U.C.C. § 3-305.

[53]*See, e.g.*, Eichelberger v. Old Nat'l Bank, 103 Ind. 401, 3 N.E. 127 (1885); Ruddell v. Fhalor, 72 Ind. 533 (1880); Bremmerman v. Jennings, 60 Ind. 175 (1877); Hereth v. Merchants' Nat'l Bank, 34 Ind. 380 (1870).

defenses.[54] The texts of both the UCC and the 1861 Act distinguish between and treat separately the defenses of a party to the instrument and the claims of ownership rights in the instrument.[55] As a result of this separate treatment, the ownership rights of holders of non-negotiable instruments are superior to those of holders of overdue or otherwise negotiable instruments and much closer to those of holders in due course under the UCC.

Although the 1861 Act clearly distinguishes between title to instruments and defenses on instruments, the cases under the Act have not always done so, and even those cases which have attempted to draw the distinction have done so in language which only serves to blur rather than to clarify. There are also cases which have totally ignored the existence of the 1861 Act and have treated the instrument involved as if it were a mere contract right rather than an instrument within the 1861 Act.[56] The result is confusion which is both unnecessary and contrary to the purposes of the Act. Although the cases agree that an indorsement is a writing on the back of the note or draft,[57] they do not consistently agree on the effect of an indorsement on the title of the indorsee.

1. The Distinction Between Claims and Defenses Clarified.—The leading case on this issue, and the first to properly interpret and apply the 1861 Act, is *Moore v. Moore*,[58] in which a prior indorser of certain non-negotiable promissory notes intervened in the holder's action against the makers. The prior indorser claimed ownership of the notes because her indorsement had been procured by the fraud of her indorsee who, long after the notes were overdue, indorsed to the current holder, an innocent purchaser for value without notice of the fraud. The prior indorser's argument, based on the New York case of *Bush v. Lathrop*,[59] was that an indorsee of non-negotiable notes takes no better interest or title than that of his immediate indorser. Therefore, since the holder-plaintiff's

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[54]U.C.C. § 3-306.

[55]The UCC distinction is made in the sections dealing with the rights of holders. *Id.* § 3-305, 306. *See generally* WHITE & SUMMERS, *supra* note 51, at § 14-9. The 1861 Act addresses claims and defenses in separate sections. IND. CODE §§ 26-2-3-1, -3 (1982). *See supra* notes 36 and 42.

[56]*See, e.g.*, McCurdy v. Bowes, 88 Ind. 583 (1883) (corporate certificate of indebtedness acknowledging debt to be due which the court should have found to be within section 1 of the 1861 Act). *Cf.* Beutel, *The Development of State Statutes on Negotiable Paper Prior to the Negotiable Instruments Law*, 40 COLUM. L. REV. 836, 864-65 (1940) (in which the author laments "the courts' habit of following or ignoring statutes without citing them").

[57]*See, e.g.*, Marion & Monroe Gravel Road Co. v. Kessinger, 66 Ind. 549, 553 (1879) (stating that "the word 'endorsement,' as applied to a note, necessarily implies a writing on the back of the note"); Reed v. Garr, 59 Ind. 299, 300 (1877); Keller v. Williams, 49 Ind. 504, 505 (1875); Kern v. Hazlerigg, 11 Ind. 443, 444 (1858).

[58]112 Ind. 149, 13 N.E. 673 (1887).

[59]22 N.Y. 535 (1860).

immediate indorser acquired no interest in the notes because of his fraud, the prior indorser claimed that she was entitled to possession and ownership of the notes.

After noting that the rule in *Bush* had been repudiated by subsequent New York decisions,[60] the *Moore* court stated that under the 1861 Act, full legal title to a non-negotiable instrument vests in the indorsee and only equitable rights remain in the indorser.[61] The court repeated the maxim that "[i]f one of two equally innocent parties must suffer, the one who, by his indorsement of the instrument, has conferred upon another the apparently absolute ownership of the paper must bear the loss."[62] The court then observed:

> The more modern rule upon the subject under consideration seems to be, that where the owner of things in action, although not technically negotiable, has clothed another, to whom they are delivered in the method common to all mercantile communities, with the ususal apparent *indicia* of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute.[63]

The court specifically distinguished between claims of ownership and defenses to payment, noting that estoppel of a prior assignor's claim would not affect the defenses available to the maker.[64]

2. The Distinction Between Claims and Defenses Blurred.—Other cases, both before and after *Moore*, as well as language in *Moore* itself, seem to conflict with the principle enunciated in that case and continued in its progeny.[65] In *Kastner v. Pibilinski*,[66] decided three years before

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[60]112 Ind. at 151, 13 N.E. at 675 (citing among others Moore v. Metropolitan Nat'l Bank, 55 N.Y. 41 (1873)). *Moore v. Metropolitan National Bank* involved a New York State certificate of indebtedness and overruled *Bush*. Because the analysis which follows in both text and footnotes refers to both *Moore v. Moore* and *Moore v. Metropolitan Nat'l Bank*, the former will be referred to simply as *Moore*, and the latter will be referred to as *Metropolitan*.

[61]112 Ind. at 151, 13 N.E. at 675.

[62]*Id.*

[63]*Id.* at 152-53, 13 N.E. at 676 (citations omitted).

[64]*Id.* at 153, 13 N.E. at 676. The Indiana Supreme Court reaffirmed *Moore* in Shirk v. North, 138 Ind. 210, 37 N.E. 590 (1894). In *Shirk*, the payee of non-negotiable notes made a "pretended assignment" by indorsing the notes in blank and delivering them to a party who was selling land to the payee's husband. The seller, who was to hold the notes only as security for the husband's debt, later indorsed the notes to a bona fide purchaser for value. In a single action, the payee sued the holder of the notes for their recovery and the maker for the amount due. The supreme court directed the trial court to sustain the defendants' demurrers. *Id.* at 219, 37 N.E. at 592. *See also* Kiefer v. Klinsick, 144 Ind. 46, 42 N.E. 447 (1895).

[65]*See* Shirk v. North, 138 Ind. 210, 37 N.E. 590 (1894); Kiefer v. Klinsick, 144 Ind. 46, 42 N.E.447 (1895).

[66]96 Ind. 229 (1884).

Moore, the holder, a good faith purchaser for value, brought suit against the makers of a past due, non-negotiable note. The payee's daughter claimed ownership of the note, alleging that the payee, who could not read, had been defrauded into believing that he had indorsed to her when in fact he had indorsed to her husband. The husband subsequently indorsed to the holder-plaintiff. The court upheld the daughter's claim, finding that the husband took no title because of his fraud, and could therefore pass no title.[67] The court went on to state that:

> The doctrine, that negligence on the part of a maker or endorser of a commercial bill or note will preclude him from defending against an action by a *bona fide* holder, does not obtain in a case where the note assigned is not commercial and is assigned after maturity. Where a commercial note is signed or endorsed, it is marketable in the hands of the holder, and is protected against defences, and men have a right to buy it as an article of commerce, which, by the law, is free from infirmities, but this is not true of a note not commercial and assigned after maturity. Instruments, such as that last named, are not protected in the hands of *bona fide* holders, and one who buys must ascertain whether the person of whom he buys has title, as well as whether the note is subject to defences.[68]

In declaring the applicable rule to be that the purchaser of past due non-negotiable "paper must inquire as to the title of his assignor, and as to defences against the note in the assignor's hands,"[69] the court ignored the 1861 Act and failed properly to distinguish between claims and defenses. The rule that the negligence of the maker or indorser will preclude him from *defending* against a holder in due course was properly found inapplicable to a non-negotiable note assigned after maturity. However, the court also noted that the contest was between the holder and the daughter on her cross-claim, not between the holder and the indorser, thereby confusing claims with defenses.[70]

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[67] *Id.* at 231-32. The court cites *Bush* for support. *Id.* at 233.

[68] *Id.* at 233.

[69] *Id.*

[70] *Id.* at 230, 232. *Robeson v. Roberts*, 20 Ind. 155 (1863), which was relied on in *Kastner* despite its inapplicability on the facts because it involved judgment notes, explained the reason for a distinction between claims and defenses:

> The difference between the two cases is clear and substantial. The party proposing to take an assignment of a judgment can go to the judgment debtor and ascertain the true state of the case. If the debtor have [sic] any equitable ground for refusing to pay, he can so state; if not, and he so state [sic] to the party proposing to take an assignment, and the purchase is made on the faith of such disclaimer, he will be thereafter estopped to set up any such matter.
>
> But a party who proposes to purchase a judgment has no means of ascertaining what claims third persons may have, or pretend to have on the judgment, unless such claims appear on or attached to the entry of judgment where the

The court in *Kastner* completely ignored the claim/defense distinction which cuts directly against the result in that case. The language and reasoning in *Kastner* appear to be directly contrary to *Moore*. Nevertheless, the court which in *Moore* had rejected the rule in *Bush*,[71] also stated that its decision was not "opposed" by *Kastner*.[72] Such a finding is confusing indeed. Perhaps the court had in mind a distinction between *Moore* and *Kastner* based on fraud in the factum in *Kastner*, and fraud in the inducement based on lack of consideration in *Moore*, a distinction which continues in the difference between real and personal defenses under UCC section 3-305.[73] If so, the court should have been far more explicit.

Carithers v. Stuart,[74] distinguished by *Moore* without explanation,[75] also can be read to conflict with the *Moore* rationale. In *Carithers*, a husband and wife had executed a mortgage as security for a series of the husband's negotiable promissory notes. After a detailed analysis of the facts, the Indiana Supreme Court concluded that because the wife (or her agent) knew or had reason to know that the bank to which the indorsed notes had been delivered possessed authority to collect but not to sell them, she could not acquire title to the notes.[76] Had the *Carithers* decision rested solely on the widow's knowledge of the bank's limited authority, there would be no problem with *Moore's* treatment of the case. However, *Carithers* appears to have relied also on the rule of *Bush*, which, the court acknowledged, had been subsequently "subject to modification"

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same is to be assigned. Hence it would seem that an assignee without notice should take the judgment freed from the claims of such third persons.

Id. at 161.

Bush itself acknowledged that there is a valid distinction between claims and defenses, but the New York court considered itself powerless to change what it perceived to be the then prevailing common law rule that an assignee of a non-negotiable instrument takes subject to all claims as well as to all defenses. 22 N.Y. at 547-59. The court in *Kastner* had also ignored the *Bush* analysis. In *Moore*, the court certainly could have used this analysis to strengthen its decision.

[71] *See supra* notes 59-60 and accompanying text.

[72] 112 Ind. at 153, 13 N.E. at 676.

[73] *See* WHITE & SUMMERS, *supra* note 51, § 14-9; *cf.* Ruddell v. Dillman, 73 Ind. 518, 521 (1881) (holding that a man who could not read had negligently failed "to inform himself of the character and contents of the instrument he executed," which was in fact a negotiable promissory note, and was liable to the holder in due course).

[74] 87 Ind. 424 (1882).

[75] 112 Ind. at 153, 13 N.E. at 676.

[76] 87 Ind. at 432-33. The holder of two of the notes had indorsed them to the Indiana bank where they were payable, allegedly for purposes of collection only, but without restrictive language. After one of the notes had been dishonored and was overdue, the bank gave the note to the widow for value. However, the bank did not mark the note paid. The widow, claiming to be the current holder of the notes secured by the mortgage, brought an action to foreclose. The central issue was whether the widow had acquired full ownership rights to the notes as assignee, in which case she would have a creditor's priority in the distribution of the proceeds from the foreclosure sale, or whether she had merely paid off the notes, in which event she would have acquired only limited subrogation rights against other heirs to her husband's estate.

by principles of estoppel in later New York cases.[77] The *Carithers* court concluded that there was no estoppel, in part because the holder never intended to transfer title to the collecting bank.[78] To the extent that this conclusion was based on the payee's intent, as opposed to the widow's notice, it ignored the analysis in the New York cases which discredited *Bush* and which emphasized that the important factor is the appearance that title has been transferred, not the intention of the transferor.[79]

In commenting on *Carithers*, the court in *Moore* considered the case "clearly distinguishable on its facts,"[80] probably because of the previously mentioned knowledge of the widow.[81] However, the court went on to state that *Carithers* "recognizes the doctrine and authorities which control our judgment in this case."[82] To the contrary, *Carithers* did not recognize the appropriate authorities—unless recognition means mere citation of the cases followed by total disregard of the analysis contained in them plus application of the rule discredited by those very cases.

To obfuscate matters further, three years after its rejection of the *Bush* rule in *Moore*, the supreme court expressly reaffirmed the *Bush* rule in *Merrell v. Springer*.[83] In *Merrell*, the court stated that in cases of non-negotiable notes transferred after maturity, "the purchaser must inquire as to the title of his assignor, and as to the defences against the note in the hands of the assignor."[84] The court relied on *Bush* and *Kastner*,[85] both of which have been discussed earlier as being either inconsistent with *Moore* or inapplicable because of important factual differences.[86]

In attempting to distinguish *Moore*, the *Merrell* court ignored the 1861 Act, *Moore's* construction and application of the 1861 Act, and the observation in *Moore* that the *Bush* rule repeatedly had been repudiated in New York and other jurisdictions.[87] The *Merrell* court concentrated instead on the fact that the note in question had never been delivered to the payee from whom the holder had acquired it, whereas in *Moore*, the party claiming ownership rights in the note had himself indorsed and delivered the note "with the intention of vesting in the assignee title" and was estopped from claiming title as against an innocent pruchaser.[88]

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[77] *Id.* at 431.

[78] *Id.* at 432.

[79] *See* Moore v. Metropolitan Nat'l Bank, 55 N.Y. 41 (1873); McNeil v. Tenth Nat'l Bank, 46 N.Y. 375 (1871).

[80] 112 Ind. at 153, 13 N.E. at 676.

[81] *See supra* notes 74-76 and accompanying text.

[82] 112 Ind. at 153, 13 N.E. at 676.

[83] 123 Ind. 485, 24 N.E. 258 (1890).

[84] 123 Ind. at 487, 24 N.E. at 259.

[85] *Id.* at 487-88, 24 N.E. at 259. The court also cites Robeson v. Roberts, 20 Ind. 155 (1863), discussed *supra* note 70.

[86] *See supra* notes 66-73 and accompanying text.

[87] 123 Ind. at 488-89, 24 N.E. at 259.

[88] *Id.*

The court may have been attempting to establish a rule that in order for a payee to be able to transfer title to a good faith purchaser, the payee himself must have acquired possession by delivery, a result with which *Moore* would be consistent.[89] The reliance on the *Bush* rule and the general requirement that the purchaser check his transferor's title, however, contradict *Moore* and confuse rather than clarify.[90]

3. Claims of Title Under the UCC and the 1861 Act.—Close analysis of this entire line of cases, starting with *Moore*, reveals the rather unsettling proposition that the indorsee of a non-negotiable instrument may obtain a better and more secure *title* to that instrument under the 1861 Act than if he were the indorsee of either an otherwise negotiable instrument or an overdue negotiable instrument under the UCC. Under the UCC, a holder in due course of a negotiable instrument takes free from "all claims to it on the part of any person,"[91] while the indorsee of an otherwise negotiable instrument or of an overdue negotiable instrument takes subject to all such claims because he cannot be a holder in due

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[89]Even today, there is ambiguity as to whether delivery is required in order to make the possessor of an instrument a holder under the UCC. *See* White, *Some Petty Complaints about Article Three*, 65 MICH. L. REV. 1315 (1967). Professor White notes that only a thief will ordinarily become the possessor of an instrument absent delivery to him, and the instrument would necessarily have to be either payable to bearer, indorsed in blank, or payable to the thief as in *Merrell*.

[90]The court's use of language clearly unnecessary to a decision eighteen years after *Moore*, in Rosenthal v. Rambo, 165 Ind. 584, 76 N.E. 404 (1905), introduced additional confusion. In that case the buyer of a horse, paid for by giving non-negotiable promissory notes, defended a suit on one of the notes by a bona fide purchaser from the horse-seller, claiming that the horse was worthless and that there was no consideration for the note. These defenses were available to him under section 3 of the 1861 Act, as the court correctly observed. *Id.* at 596, 76 N.E. at 408. In so doing, however, the court used language which was based on section 1 rather than section 3:

> The notes in suit belong to this class of instruments [promises assignable under section 1, but citing section 3]. As to them there can be no such thing as a *bona fide* or good faith purchaser, vesting in some assignees a better title than the payee and assignor possessed, as recognized in instruments negotiable by the law merchant. Though promises to pay money, these notes are transferable in the same manner as written promises to deliver particular articles, or to perform particular acts, and appellant, as assignee, took the property in them charged with all the equities, conditions and burdens that adhered to them, precisely as they were held by [the assignor].

Id. Moreover, none of the string of cases cited by *Rosenthal* to support this failure to distinguish between defenses and claims of ownership supported its reasoning. Seven of the cases involved non-negotiable notes to which the makers had defenses based on the underlying transactions rather than claims of ownership or title. Cohen v. Prater, 56 Ga. 203 (1876); Henry v. Gilliland, 103 Ind. 177 (1885); Herod v. Snyder, 48 Ind. 480 (1874); Holman v. Creagmiles, 14 Ind. 177 (1860); Second Nat'l Bank v. Wheeler, 75 Mich. 546, 42 N.W. 963 (1889); Benton v. Klein, 42 Mo. 97 (1867); Wetter v. Kiley, 95 Pa. 461 (1880). The remaining two cases involved assignments without indorsements. Smith v. Rogers, 14 Ind. 224 (1860); Howell v. Medler, 41 Mich. 641, 2 N.W. 911 (1879).

[91]U.C.C. § 3-305(1).

course.[92] *Moore* and the cases which follow it stand at least for the principle that pursuant to section 1 of the 1861 Act, if the owner of an instrument is persuaded to transfer ownership to an indorsee, even if by the indorsee's fraud in the inducement, that indorsee may himself transfer good title by indorsing to a bona fide purchaser for value without notice of any infirmity in his seller's title.[93] *Shirk v. North*[94] and *Kiefer v. Klinsick*[95] add that even if the indorsing owner intends to transfer only possession but not ownership, that indorsement, as a consequence of the 1861 Act, effectively clothes the indorsee with a sufficient indicia of ownership so as to empower him to transfer full ownership rights to a bona fide purchaser despite the owner's intentions. Thus, if the reason an instrument lacks negotiability under the UCC is its failure to meet one of the specific requirements of section 3-104,[96] the instrument is completely outside the coverage of the UCC and the indorse takes free of claims of third persons pursuant to section 1 of the 1861 Act and the cases interpreting it.[97]

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[92]*Id.* § 3-306(a). The fact that an instrument is not negotiable, however, does not necessarily mean that it cannot be transferred free of latent claims of ownership or even free of defenses under certain circumstances, where common law principles such as estoppel or bona fide purchase are applicable. *See* Beutel, *Negotiability by Contract, A Problem in Statutory Interpretation*, 28 ILL. L. REV. 205, 208-10 (1933) [hereinafter cited as *Negotiability by Contract*]. *See infra* notes 136-43 and accompanying text (discussing estoppel in connection with defenses). Thus, as one scholar observed, a purchase option of an instrument outside the coverage of the NIL or the UCC

> is protected against claims of ownership by the so-called indicia of title, estoppel and bona fide purchase, all of which are no part of the law of negotiability; the result being that strictly non-negotiable paper properly worded may pass free of claims of ownership to any bona fide purchaser except one who takes from a thief or a finder.

Beutel, *supra* at 209. The 1861 Act and the line of cases following *Moore* have effectively codified estoppel, indicia of title, and bona fide purchase as part of Indiana's law of negotiable instruments.

[93]This is so despite the court's attempted distinction of *Moore* in *Merrell*.

[94]138 Ind. 210, 37 N.E. 590 (1894). *See supra* note 64.

[95]144 Ind. 46, 42 N.E. 447 (1895).

[96]*See, e.g.*, U.C.C. § 3-105(2) (payable out of a specific fund or governed by the terms of another writing).

[97]In discussing a similar problem under the NIL twenty years ago, one commentator expressed astonishment that "in several situations a holder of a non-negotiable chose in action is afforded greater protection [under the common law] than a holder of a negotiable chose." Olds, *Should Negotiable Instruments Suffer Disadvantages Not Shared by Non-Negotiable Choses in Action*, 2 HOUS. L. REV. 43, 43 (1964). He was particularly concerned with the provisions of the NIL which provided that the taker of an overdue instrument is subject to claims of ownership. *Id.* at 44. Even earlier, Professor Chafee suggested that the bona fide purchaser for value of an overdue negotiable instrument should be able to take free of claims of ownership but should still be subject to defenses of prior parties. Chafee, *Rights in Overdue Paper*, 31 HARV. L. REV. 1104, 1108 (1918). The UCC has rejected this suggestion; the indorsee of an overdue negotiable instrument cannot be a holder in due course and therefore takes subject to both claims and defenses. U.C.C. §§ 3-302(1)(c), 3-306.

B. *Defenses and Set-Offs to the Holder's Action*

Once the ownership of an instrument is determined, the next issue is what defensive positions are available to a maker in the holder's action on the note to enforce payment. The UCC speaks only of "claims" and "defenses."[98] The 1861 Act speaks of "defense *or set-off*."[99] Although both defenses and set-offs are raised as defensive responses, cases have drawn a definite distinction beween the two:

> A set-off, strictly speaking, is not a defence to the action in which it may be filed. It is simply a cross action; and as such it must state facts sufficient to constitute, not a defence to the action in which it may be filed, but a cause of action against the opposite party.[100]

Moreover, set-off was unknown at common law and is based entirely on statute.[101]

1. Defenses.—Which holder may be subject to defenses is relatively clear. The UCC states unequivocally that the holder in due course of a negotiable instrument takes free of all defenses except the specifically enumerated real defenses.[102] The UCC also provides that the indorsee who takes an overdue instrument or an otherwise negotiable instrument is not a holder in due course[103] and takes subject to all defenses.[104] The indorsee of the non-negotiable note takes subject to any defenses on the instrument which the maker had against either the payee or subsequent indorsee before the maker received notice of the assignment.[105] Accordingly, the good faith purchaser-indorser for value of a non-negotiable instrument, an overdue negotiable instrument, or an otherwise negotiable instrument stand on the same footing with respect to defenses.

One defense frequently asserted by makers in actions to enforce instruments is lack of consideration. While under the UCC the holder in due course takes free of this defense,[106] and holders of overdue or otherwise negotiable instruments do not,[107] the UCC creates a presumption of

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[98]*See* U.C.C. §§ 3-305, 3-306.

[99]IND. CODE § 26-2-3-3 (1982) (emphasis added).

[100]Kennedy v. Richardson, 70 Ind. 524, 530 (1880). *Accord* McKinney v. Pure Oil Co., 129 Ind. App. 223, 228, 154 N.E.2d 53, 55 (1958). *See generally* T. WATERMAN, A TREATISE ON THE LAW OF SET-OFF, RECOUPMENT, AND COUNTERCLAIM (2d ed. 1872).

[101]*See* McKinney v. Pure Oil Co., 129 Ind. App. 233, 228, 153 N.E.2d 53, 55 (1958); O. BARBOUR, A TREATISE ON THE LAW OF SET-OFF (1841); T. WATERMAN, *supra* note 100, at § 10.

[102]U.C.C. § 3-305(2). *See also* WHITE & SUMMERS, *supra* note 51, at § 14-9.

[103]*See supra* notes 12-16 and accompanying text.

[104]U.C.C. § 3-306(b)-(d). *See also* WHITE & SUMMERS, *supra* note 51, at § 14-10.

[105]IND. CODE § 26-2-3-3 (1982). Section 3 of the 1861 Act is quoted in full *supra* note 42.

[106]*See* U.C.C. § 3-305(2).

[107]*See id.* §§ 3-302(1)(c), 3-306(c), 3-805.

consideration in favor of all holders, whether in due course or not. Once a holder introduces the instrument into evidence and establishes the maker's signature, the defendant maker has the burden of establishing whatever defense she may have by a preponderance of the evidence.[108]

The position of the holder of the non-negotiable instrument under the 1861 Act, with respect to the presumption of consideration, is substantially similar to that of a holder under the UCC and is superior to that of the plaintiff in a simple contract action. The cases have stated uniformly that in an action on a note, whether fully negotiable under the law merchant or negotiable only pursuant to section 1 of the 1861 Act, there is a presumption of consideration so that there need be no allegation of consideration in the pleadings and no proof of consideration at trial, unless the defendant introduces evidence of the lack thereof.[109] As the court stated in one case, "The general rule in this State is, that all negotiable paper is presumed to have been given upon sufficient consideration, and this rule obtains, whether the paper sued on be negotiable under the law merchant, or assignable under the provisions of the statute."[110] The plaintiff in a simple contract action, on the other hand, does not enjoy even a presumption of consideration and must allege and prove all elements of recovery, including consideration.

2. Set-Off.—The more difficult problem arises with respect to prior party set-off, i.e., whether the maker or drawer of an instrument may assert against a remote indorsee-plaintiff (the holder) a set-off unrelated to the transaction giving rise to the instrument which the maker had against an earlier holder or against the payee.

Although section 3-305 of the UCC says nothing specifically about set-off, it would be totally illogical for the holder in due course, who takes free of all but real defenses, to take subject to a totally unrelated set-off which the maker or drawer may have had against the payee or other prior holder. The only acceptable and logical conclusion is that a set-off which would have been available against a prior party is not available against a holder in due course.[111] This was so under the law

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[108]*See id.* § 3-307(2) & official comment 2; *id.* § 3-408 & official comment 3.

[109]*See, e.g.*, Louisville, E. & St. L. Ry. Co. v. Caldwell, 98 Ind. 245, 252 (1884); Durland v. Pitcairn, 51 Ind. 426, 438 (1875); Harden v. Wolf, 2 Ind. 31, 32 (1850); Deeter v. Burk, 59 Ind. App. 449, 460, 107 N.E. 304, 308 (1914); *see also* Goodrich, *supra* note 50, at 71-72 (1920); *Recent Important Decisions, Bills and Notes—Non-Negotiable Notes—Presumption of Consideration*, 24 MICH. L. REV. 63 (1925).

[110]Durland v. Pitcairn, 51 Ind. 426, 438 (1875).

[111]*See* Britton, *Holder in Due Course—A Comparison of the Provisions of the Negotiable Instruments Law with Those of Article 3 of the Proposed Commercial Code*, 49 NW. U.L. REV. 417, 437 (1954) ("If the maker or acceptor has a right of set-off against the payee, obviously, the set-off is unavailable against a holder in due course"); Morris, *The Use of Set-Off, Counterclaim and Recoupment: Availability Against Commercial Paper*, 62 W. VA. L. REV. 140, 155 (1959).

merchant, [112] and there is no reason for a different result under the UCC.

In the case of non-negotiable instruments, the 1861 Act mandates that the indorsee take subject to "[w]hatever defense *or setoff*" which the maker had against the indorser prior to receiving notice of the assignment by indorsement.[113] Thus, the purchaser for value of a non-negotiable instrument takes subject not only to defenses arising out of the transaction which created the instrument, such as lack of consideration, breach of warranty, or fraud in the inducement,[114] but also to whatever unrelated set-off the maker had against any prior party to the instrument before the maker received notice of transfer by the prior party. There appears to be no disagreement in the cases on this last point,[115] and this comports with the common law of assignments.[116]

Whether the holder of either an overdue or otherwise negotiable instrument under the UCC also takes subject to prior party set-off is substantially less certain. When the UCC was proposed for adoption in Indiana, Professors Pratter and Townsend commented that section 3-306 does not make clear whether the maker's right of set-off based on a cause of action separate from the instrument is cut off by transfer to a subsequent

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[112]*See* Hankins v. Shoup, 2 Ind. 342, 343 (1850). "It is decided, *even where a note is overdue when indorsed*, that matter of set-off due from the payee, not arising out of the note transaction, cannot be claimed against the indorsee, though the set-off was due to the maker whilst the payee held the note." *Id.* at 343 (emphasis added).

[113]IND. CODE § 26-2-3-3 (1982) (emphasis added). *See supra* note 42 for text of section 3 of the 1861 Act.

[114]*See, e.g.*, Rosenthal v. Rambo, 165 Ind. 584, 76 N.E. 404 (1905) (breach of warranty); Herod v. Snyder, 48 Ind. 480 (1874) (breach of warranty); Holman v. Creagmiles, 14 Ind. 177 (1860) (failure of consideration); Doremus v. Bond, 8 Blackf. 368 (Ind. 1847) (failure of consideration). *But cf.* Iverson, *Enforcement and Negotiation of Government Warrants*, 8 UTAH L. REV. 28, 29 (1962) (listing "set-off" as one of the personal defenses to which the taker of a non-negotiable instrument is ordinarily subject).

[115]The most typical set-off situation has involved the maker's attempt to set off a note or judgment acquired against the payee or a prior indorsee. Where the note or judgment was acquired prior to both the transfer and notice thereof, set-off was proper. *See, e.g.*, Abshire v. Corey, 113 Ind. 484, 15 N.E. 685 (1888); Hoffman v. Zollinger, 39 Ind. 461 (1872); King v. Conn, 25 Ind. 425 (1865); Woods v. Dalrymple, 12 Ind. App. 598, 39 N.E. 883 (1895). Where the note being set off was acquired after transfer of the instrument in suit and notice thereof, set-off was improper. *See, e.g.*, Weader v. First Nat'l Bank, 126 Ind. 111, 25 N.E. 887 (1890); Proctor v. Cole, 115 Ind. 15, 17 N.E. 189 (1888); Sayres v. Linkhart, 25 Ind. 145 (1865). *See also* Cox v. Bank of Westfield, 18 Ind. App. 248, 47 N.E. 841 (1897), in which the maker continued to extend credit to the payee in anticipation of a set-off. The court there observed:

> [A]ny one who purchases a note not governed by the law merchant, should at once notify the maker of the change of ownership, if he desires to be protected from defenses afterward acquired by the maker; and the maker of the note is thus placed upon his guard and warned not to extend credit to the payee, upon the supposition that the same will be a credit upon his contract when the time for settlement arrives.

Id. at 249-50, 47 N.E. at 842.

[116]*See* Morris, *supra* note 111, at 155.

holder not in due course.[117] Citing section 3 of the 1861 Act, they presumed that such a set-off, if valid at the time of the transfer, "constitutes such a defense that it will not be cut off."[118] The authors also stated that a set-off acquired by the maker against a transferor after the transfer but before notice to the maker could not be raised against the new holder.[119]

In an analysis of the availability of set-off under both the NIL and the UCC, another commentor observed a lack of uniformity among the states.[120] He concluded that, unless a separate statute provides otherwise, set-off should not be available against a holder not in due course.[121] The only possible exception mentioned was where the set-off had matured before the transfer and notice thereof to the maker. However, this commentor failed to distinguish between the otherwise negotiable instrument and the overdue negotiable instrument, only the latter being within the coverage of the NIL.

The overdue negotiable/otherwise negotiable instrument distinction as to set-off has not been addressed by the Indiana courts since the adoption of the UCC. An analogous problem arose under section 58 of the NIL[122] in *Fox v. Terre Haute National Bank*,[123] where the payee of a note brought suit against the accommodation maker. The accommodation maker claimed that he had been discharged when the true maker and the payee, who knew of the defendant's accommodation status, agreed to an extension of time without notifying the defendant. Quoting section 58 of the NIL, which subjects a holder not in due course to the same defenses as if the note were not negotiable,[124] the court observed that after the word "defenses" should be read "existing at the time of its execution or arising out of the original transaction."[125] The court would allow a defense such as lack of consideration, but not a defense which arose subsequent to the creation of the note and out of a separate transaction, such as the defense in the case.[126]

Courts in other jurisdictions have considered this problem under the UCC, but the only point on which the cases generally agree is that state law prior to the adoption of section 3-306 will determine whether a holder

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[117]*See* PRATTER & TOWNSEND, *supra* note 28, § 3-306 comments.

[118]*Id.*

[119]*Id.*

[120]Morris, *supra* note 111, at 141.

[121]*Id.* at 162.

[122]This section was formerly codified at IND. CODE ANN. § 9089f2 (Burns 1914). "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable." *Id.*

[123]78 Ind. App. 666, 129 N.E. 33 (1920).

[124]*Id.* at 678, 129 N.E. at 37.

[125]*Id.*

[126]*Id.* Although the court acknowledged the statutory language that the defenses should be those available as if the note was not negotiable, the court made no reference to the 1861 Act.

not in due course who is subject to defenses will also be subject to set off,[127] thus assuring that there will be no national uniformity because of the differing state laws prior to the adoption of the UCC.

The inference from the Indiana cases is that otherwise negotiable instruments, which were never negotiable under the law merchant, and overdue negotiable instruments, which were negotiable by definition, are to be treated differently. The former are controlled by section 3 of the 1861 Act and, therefore, are subject to set-off existing prior to notice of the transfer. The latter are subject only to set-off which existed at the time of the transaction giving rise to the instrument. Once again, however, the cases lack precision.

In *Hankins v. Shoup*,[128] the court rejected the contention of the maker that the predecessor to section 3 of the 1861 Act made collateral set-off available against the indorsee of a negotiable instrument which was

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[127]*See* Note, *Prior Party Set-Off as Defense under U.C.C. Section 3-306(b)*, 1981 U. ILL. L. REV. 869, in which the author acknowledges that the issue presently is determined in the various states according to the law preceeding the NIL. To avoid the lack of uniformity caused thereby the author suggests that the courts look to current contract law. *Id.* at 889-95. In one leading case, United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596 (D. Md. 1974), as a matter of Maryland law under UCC § 3-306, the maker was not permitted to set off a collateral claim against a prior holder in an action on a negotiable note brought by a current holder not in due course. Since § 58 of the NIL, the predecessor to § 3-306, dealt only with "defenses," the court determined that § 58 would have no effect on the earlier state law as to the availability of set-off in a suit on a negotiable instrument. 375 F. Supp. at 607-08. In the absence of any Maryland decision on point, the court relied on the Virginia interpretation of § 58 in Stegal v. Union Bank & Fed. Trust Co., 163 Va. 417, 176 S.E. 438 (1934). The court concluded that under the pre-NIL Maryland law, prior party set-off was available only against the transferee of a non-negotiable instrument, but not against the transferee (holder not in due course) of a negotiable instrument. 375 F. Supp. at 609. A similar conclusion based on Missouri law was reached in Bank of Wyandotte v. Woodrow, 394 F. Supp. 550, 555-56 (W.D. Mo. 1975), in which defendant drawers unsuccessfully attempted to assert claims arising from separate transactions with the payees in an action on a check by a mere holder. Because it concluded that any holder of a negotiable instrument, whether in due course or not, would not be subject to prior party set-off, the court did not reach the question whether the holder in fact held in due course. *Id.* at 556. *See also* Olsen-Frankman Livestock Mktg. Serv. v. Citizens Nat'l Bank, 605 F.2d 1082 (8th Cir. 1979) (prior party set-off available against one not a holder in due course both before and after the NIL under Minnesota law); Srochi v. Kamensky, 118 Ga. App. 182, 162 S.E.2d 889 (1968) (holder of overdue negotiable instrument takes subject only to equities arising on the instrument under Georgia law). *But see* Litcher v. North City Trust Co., 111 Pa. Super. 1, 169 A. 409 (1933) (holding that NIL § 58 had repealed prior law of set-off and that set-off was available against a holder not in due course). *Cf.* Britton, *supra* note 111, at 437; Note, *supra* note 127. The Indian law of set-off prior to the NIL consisted of § 3 of the 1861 Act and a general set-off statute. The statute provided that in an action on a contract right *not assigned by indorsement*, the assignor must be made a party defendant, and that actions by assignees would be subject "to any set-off, or other defense existing at the time of, or before notice of the assignment." IND. CODE ANN. § 2-226 (Burns 1946) (repealed 1963).

[128]2 Ind. 342 (1850).

overdue. The court observed that had section 3 stood alone, prior party set-off would have been an appropriate defense in a suit on the overdue negotiable note. However, the predecessor to section 6 of the 1861 Act provided that the law merchant should be unaffected as to certain promissory notes, and that the note in question was such a note. Under the law merchant, the court ruled, the holder of an overdue negotiable instrument took free of any set-off between the maker and the payee which did not arise from the note transaction.[129]

In an action by the transferee of an overdue negotiable note, the Indiana Supreme Court observed that if a payee holds a note until it is overdue, this is notice to subsequent takers that there may be *equities* in favor of the maker to which the note is subject.[130] The maker, therefore, was allowed to raise the defense of lack of consideration. In view of the Indiana position that set-off is essentially statutory, rarely equitable,[131] and distinct from genuine defenses on the instrument itself, prior party set-off should not be available against the holder of an overdue negotiable instrument. Thus, at least as to an overdue negotiable instrument, it appears that the indorsee after maturity who cannot hold in due course will be subject only to a set-off between the maker and prior parties which arose from the transaction in which the instrument was created. Subsequent collateral set-offs should not be available.

The position of the holder of an otherwise negotiable instrument is not as secure as that of the holder of an overdue negotiable instrument, primarily because the otherwise negotiable instrument was not negotiable under the law merchant and did not acquire any characteristics of negotiability, in the complex sense, until the adoption of section 3-805 of the UCC.[132] In *Louisville, Evansville & St. Louis Railway Co. v. Caldwell*,[133] the court declared that the absence of words of negotiablity from a bill of exchange did not make it any less negotiable under section 1 of the 1861 Act, even if it were not negotiable under the law merchant. The court, however, was concerned with other issues and did not discuss

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[129]*Id.* at 343-44. *Accord* Proctor v. Cole, 115 Ind. 15, 17 N.E. 189 (1888); *cf.* J. BYLES, A TREATISE ON THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES AND CHECKS 266-67 (6th Am. ed. 1874); J. OGDEN, THE LAW OF NEGOTIABLE INSTRUMENTS 157 (2d ed. 1922). *See generally* Annot., 70 A.L.R. 245 (1931).

[130]First Nat'l Bank v. Henry, 156 Ind. 1, 10, 58 N.E. 1057, 1060 (1900).

[131]*See supra* note 101 and accompanying text. In Green v. Louthain, 49 Ind. 139 (1874), the court did state that "[i]t is well settled, that the plaintiff, having acquired title to the note after its maturity and dishonor, holds the same subject to all defenses which could be made to an ordinary promissory note." *Id.* at 141. The issues involved, however, were typical defenses—lack of consideration and usury—rather than set-offs.

[132]U.C.C. § 3-305 official comment; Britton, *Formal Requisites of Negotiability—The Negotiable Instruments Law Compared with the Proposed Commercial Code*, 26 ROCKY MTN. L. REV. 1, 3 (1953); Note, *supra* note 15, at 214.

[133]98 Ind. 245 (1884).

defenses or set-off.[134] Nevertheless, the clear implication is that the otherwise negotiable instrument was treated as a non-negotiable instrument for law merchant purposes, will be controlled by section 3 of the 1861 Act, and may therefore be subject to prior party set-off arising prior to notice of transfer.

Both fairness and reasonable expectations support the assumption of Professors Pratter and Townsend that set-offs in existence at the time of the transfer will not be cut off, as well as their suggestion that the maker's set-offs acquired against the transferor after transfer should not be available in an action by the transferee.[135] While this may be correct as to overdue negotiable instruments, examination of the 1861 Act and the cases thereunder casts serious doubt on whether their assumption, appropriate though it may be, is correct as to the otherwise negotiable instrument.

3. Estoppel—As noted earlier in connection with claims of title, an important limitation on the rights of the maker or indorser of a non-negotiable instrument arises from the principle of estoppel.[136] Representations by the maker to a prospective purchaser that the instrument is good, is not subject to any defenses or set-offs, and will be paid when due will preclude the maker from subsequently asserting defenses or set-offs when the purchaser seeks to collect on the instrument.[137] This is so even if the maker was unware of the defense when he made the representation.[138] Thus, makers have been precluded from raising such otherwise assertable personal defenses as breach of warranty,[139] alteration,[140] and fraud.[141]

A representation by the maker made after the purchaser acquires the instrument, absent other factors such as detrimental reliance on such representation, will not estop the maker from asserting his defense or set-off at the time the non-negotiable instrument falls due.[142] However, an agreement by the holder to extend the time for payment to a specific

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[134]The court was primarily concerned with the presumption of consideration which negotiable instruments enjoy. *Id.* at 251-52.

[135]*See supra* notes 117-19 and accompanying test.

[136]*See supra* note 92.

[137]*See, e.g.*, Krathwohl v. Dawson, 140 Ind. 1, 3, 38 N.E. 467, 468 (1894); Hoover v. Kilander, 83 Ind. 420, 421 (1882); Stutsman v. Thomas, 39 Ind. 384, 390 (1872); Musselman v. McElhenny, 23 Ind. 4, 6 (1864); *cf. Negotiability by Contract, supra* note 91, at 209-10; *Recent Important Decisions, Bills and Notes—Estoppel in Non-Negotiable Note Allowing Holder Same Rights as if Notes Were Negotiable*, 27 MICH. L. REV. 332 (1929).

[138]*See* Plummer v. Farmers Bank, 90 Ind. 386 (1883).

[139]*See* Rose v. Teeple, 16 Ind. 37 (1861) (sale of sheep); Sloan v. Richmond Trading & Mfg. Co., 6 Blackf. 175 (Ind. 1842) (sale of liquor).

[140]*See* Krathwohl v. Dawson, 140 Ind. 1, 3, 138 N.E. 467, 468 (1894) (sale of land).

[141]*See* Sloan v. Richmond Trading & Mfg. Co, 6 Blackf. 175 (Ind. 1842) (sale of sheep).

[142]*See, e.g.*, Hoover v. Kilander, 83 Ind. 420, 421 (1882); Stutsman v. Thomas, 39 Ind. 384, 390 (1872).

date in response to the maker's promise to pay on that date has been held to constitute a new promise to pay, and the maker will be estopped from asserting any defenses or set-offs which would have been good had the holder not extended the time for payment.[143]

Thus, by his own conduct or representations, the maker or drawer can create an estoppel which will give the holder of a non-negotiable instrument a position as strong as that of a holder in due course of a negotiable instrument under the UCC.

C. Liability of the Indorser to the Holder

The extent of the liability of an indorser of a non-negotiable instrument under the 1861 Act lies somewhere between the liability of an indorser under the UCC and that of a mere assignor of a contract right.

1. Liability Under the UCC.—The indorser's engagement under the UCC, whether he indorses a negotiable, otherwise negotiable or overdue negotiable instrument, is clear: "Upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement."[144] Dishonor occurs when, upon presentment, the maker refuses to pay for any reason whatsoever.[145] Once the maker of an instrument covered by the UCC refuses to pay, because he believes he has a valid defense or for any other reason, the holder has an immediate right against the indorser and may proceed directly against him without any further action against the maker.[146]

The non-indorsing transferor under the UCC does not assume the indorser's liabilities, but he does warrant to the transferee that he has good title, that all signatures are authorized, that there have been no material alterations to the instrument, and that there are no defenses good against him.[147]

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[143]*See, e.g.*, Brown v. First Nat'l Bank, 115 Ind. 572, 578-79, 18 N.E. 56, 59-60 (1888); Millett v. Aetna Trust & Sav. Co., 70 Ind. App. 451, 457, 122 N.E. 344, 346 (1919); McCormick Harvesting Mach. Co. v. Yeoman, 26 Ind. App. 415, 416, 59 N.E. 1069, 1069 (1901).

[144]U.C.C. § 3-414(1).

[145]*See id.* § 3-507(1).

[146]*Id.* § 3-507(2).

[147]*See id.* § 3-417(2). Contrasted to the UCC's transferor is the non-indorsing assignor of a non-negotiable instrument who warrants only that the document or right being assigned is genuine. Unless it is otherwise agreed or understood, he makes no representation whatever concerning the solvency of the obligor or the likelihood that the obligor will pay and is not obligated to pay if the obligor does not. *See* McCurdy v. Bowes, 88 Ind. 583 (1883); Shirts v. Irons, 37 Ind. 98 (1871); Earnest v. Barrett, 6 Ind. App. 371, 373-74, 33 N.E. 635, 636 (1893); RESTATEMENT (SECOND) OF CONTRACTS § 333 (1981); 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 445, at 320-21 (3d ed. 1960). In *Shirts*, the court ruled that a non-indorsing assignor of accounts, which were not within the 1861 Act, did not warrant the solvency of the account debtor. 37 Ind. at 103-04. *McCurdy* cited *Shirts* to this effect, 88 Ind. at 586, but *McCurdy* involved certificates of indebtedness issued by the receiver of an insolvent corporation and the indorsement of those certificates to a third

The UCC also provides that the indorser will be discharged "[w]here without excuse any necessary presentment or notice of dishonor is delayed beyond the time when it is due."[148] A delay in presentment or notice of dishonor will be excused if "caused by circumstances beyond [the holder's] control and [if] he exercises reasonable diligence" thereafter.[149] Presentment and notice are excused entirely if, inter alia, the party to be charged has waived it or has no reason to expect that the instrument will be paid, and presentment is entirely excused if the maker is in insolvency proceedings filed after the instrument was issued.[150]

2. Liability Under the 1861 Act.—With an end result similar to that under the UCC, the indorser of a note or draft negotiable under the 1861 Act but not under the law merchant, warrants (1) that the maker is liable on the instrument, *i.e.*, that the maker has no defenses to it, and (2) that the maker will be able to pay it when it comes due.[151] However, unlike the UCC's indorser, this indorser does not warrant that he will pay if the maker merely refuses to pay.

Section 4 of the 1861 Act requires the holder to use "due diligence" prior to suit against any indorser.[152] "The due diligence to be used by the endorsee to obtain the money from the drawer, which our statute requires, is very different from a mere demand upon the drawer, and notice of non-payment to the endorser, according to the custom of merchants."[153] Due diligence under the 1861 Act ordinarily requires the holder first to institute suit against the maker and fail to collect his judgment before proceeding against the indorser.[154]

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person. After finding that the certificates were not negotiable instruments, because they lacked an express promise to pay and were payable out of a specific fund, the court concluded that the transfer was a mere assignment without a warranty of solvency. *Id.* at 584-85. The court was most likely referring to the law merchant, because it failed to mention the 1861 Act. Had the court applied the 1861 Act, as it should have, it would have realized that the certificate was negotiable within the Act. Compare *McCurdy* with Johnson School Township v. Citizens Bank, 81 Ind. 515 (1882), in which, one year prior to *McCurdy*, the court applied the 1861 Act to a document which stated that "there is due . . . and payable" a sum for school furniture but contained no express promise to pay.

[148]U.C.C. § 3-502(1)(a).

[149]*Id.* § 3-511(1).

[150]*Id.* § 3-511(2), (3).

[151]*See, e.g.*, Brown v. Nichols, Shephard & Co., 123 Ind. 492, 497, 24 N.E. 339, 340 (1890); Willson V. Binford, 81 Ind. 588, 594 (1882); Black v. Duncan, 60 Ind. 522, 532 (1878); Clark v. Trueblood, 16 Ind. App. 98, 100-01, 44 N.E. 679, 679-80 (1896); *cf.* Miscellany, *Liability of Endorser of Non-Negotiable Paper to Endorsee*, 12 VA. L. REG. 232 (1926). *See generally*, Annot., 79 A.L.R. 719 (1932).

[152]IND. CODE § 26-2-3-4 (1982) ("Any such assignee [read indorsee], having used due diligence in the premises, shall have his action against his immediate or any remote endorser . . . .").

[153]Bullitt v. Scribner, 1 Blackf. 14, 15 (Ind. 1818); *cf.* Comment, *Responsibility of an Indorser on a Non-Negotiable Instrument*, 37 YALE L.J. 102 (1927).

[154]*See, e.g.*, Davis v. Leitzman, 70 Ind. 275, 278-79 (1880); Lowther v. Share, 44 Ind. 390, 391 (1873).

Moreover, suit against the maker is required to be instituted at the earliest opportunity following maturity of the instrument.[155] Current procedure, which permits the filing of suit at any time, would require suit "at the earliest possible time."[156] Thus, although both the UCC and the 1861 Act require the exercise of "diligence" by the holder, in the absence of which the indorser will be discharged, the diligence to be exercised under the 1861 Act requires much more of the holder before he can proceed against the indorser. Furthermore, the joinder of the maker and the indorser as codefendants in the same lawsuit is improper under the 1861 Act because the cause of action against the indorser ordinarily arises only after suit against the maker and an unsuccessful attempt to collect from him.[157]

Just as the UCC excuses diligence in presentment under certain circumstances,[158] due diligence under the 1861 Act does not require suit against the maker where pursuing the maker will cause needless litigation and expense.[159] Suit against the maker is excused, for example, where the maker was insolvent and owned no attachable property as of the time judgment could have been first obtained against him, even if he had had property on the date his note fell due,[160] or was notoriously insolvent

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[155]*See, e.g.*, Lowther v. Share, 44 Ind. 390, 391 (1873) ("within a reasonable time"); Miller v. Deaver, 30 Ind. 371, 372 (1868); Huston v. Fatka, 30 Ind. App. 693, 700, 66 N.E. 74, 76 (1903).

[156]Matchett v. Anderson Foundry & Mach. Works, 29 Ind. App. 207, 64 N.E. 229 (1902) (citing Thompson v. Campbell, 121 Ind. 398, 23 N.E. 267 (1890)); *see also* Huston v. Fatka, 30 Ind. App. 693, 700, 66 N.E. 74, 76 (1903). In *Thompson*, where the holder knew of the maker's failing economic circumstances, waiting to file suit until the next term of court when suit could properly have been filed at an earlier time was held improper. 121 Ind. at 403, 23 N.E. at 268. The requirement that suit was to be filed in the next term after the due date of the note was based on an old procedural rule which did not permit filing during term time, a rule no longer in effect when the note in *Thompson* fell due. Similarly, in Roberts v. Masters, 40 Ind. 461 (1872), the court, acting under the older procedural rule, strictly interpreted the requirement of due diligence and ruled that the holder should have filed suit against the maker on the day after the due date of the note, which happened to be the last day to commence action in the next term. *Id.* at 466-68. The next available term of court did not commence until several months later, and the maker had become insolvent in the interim. Having failed to exercise due diligence against the maker, the holder-indorsee was precluded from recovering against his indorser.

[157]*See* Couch v. First Nat'l Bank, 64 Ind. 92 (1878); Smith v. Zabel, 86 Ind. App. 310, 157 N.E. 551 (1927). In *Couch*, the court stated that when notes are negotiable under the law of Indiana, meaning the 1861 Act, but not under the law merchant, "[i]t would seem that makers and endorsers could not be joined in an action, except in cases where the endorsers are liable without a suit having been first brought against the makers." 64 Ind. at 95. This language was repeated in *Smith v. Zabel*, in which the court held that a claim against an indorser could not be raised by the holder as a cross-complaint against the indorser in an action by the maker against the payee-indorsers and the holder to enjoin collection of the note allegedly obtained by fraud. 86 Ind. App. at 321, 151 N.E. at 555.

[158]*See* U.C.C. § 3-511. *See supra* notes 149-50 and accompanying text.

[159]*See* Dick v. Hitt, 82 Ind. 92, 93 (1882).

[160]*See* Reynolds v. Jones, 19 Ind. 123 (1862). The court found that:

at the time the note fell due and owned no property subject to execution,[161] apparently on the premise that there was little likelihood that he would acquire reachable property by the time judgment could be obtained in the ordinary course. It is not enough that the holder believe he would not be able to recover from the maker; the holder must either proceed with suit against the maker or allege and prove, in his action against the indorser, the maker's insolvency and lack of property.[162]

Prior suit against the maker immediately after maturity of the non-negotiable note also has been excused where the delay in filing suit was at the request of the indorser, usually with the maker becoming insolvent in the interim;[163] where the maker was an infant;[164] where the instrument is invalid as against the maker since such invalidity is a breach of the indorser's warranty of the maker's liability;[165] and where the maker became a non-resident after the assignment of the note but before its maturity,[166] even if the maker left property in Indiana which might have been subject to attachment[167] or returned to Indiana temporarily with attachable property in his possession.[168] The rationale underlying these last excuses is that the holder will not be required to resort to extraordinary or doubtful remedies such as pre-judgment attachment.[169]

3. Damages Recoverable from Indorser Under the UCC and the 1861 Act.—Another difference between the indorser's liability under the UCC on any of its three instruments and his liability under the 1861 Act relates to the amount recoverable by the holder in a suit against his indorser. Under the UCC, the indorser engages that upon dishonor of the note he will pay it according to its tenor at the time of his indorsement.[170] Under the 1861 Act, the holder is not automatically entitled to the amount

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> "Due diligence" does not, in our opinion, require a suit to be brought against the maker in cases where a judgment, obtained as soon as it could be done after the note matured, would be wholly unavailing, because the insolvency of the maker, although he might not have been insolvent at the time the note matured.

Id. at 124. In *Reynolds*, there was a lapse of time between the due date of the note and the time when the holder could sue under then existing rules of procedure. The maker had become insolvent in the interim.

[161] *See, e.g.*, First Nat'l Bank v. Stapf, 165 Ind. 162, 164, 74 N.E. 987, 988 (1905); Smythe v. Scott, 106 Ind. 245, 248-49, 6 N.E. 145, 147 (1886); Huston v. First Nat'l Bank, 85 Ind. 21, 25 (1882); Gwin v. Moore, 79 Ind. 103, 105 (1881).

[162] *See* Guio v. Lutes, 97 Ind. App. 157, 161, 184 N.E. 416, 418 (1933).

[163] *See, e.g.*, Davis v. Leitzman, 70 Ind. 275, 278-79 (1880); Lowther v. Share, 44 Ind. 390, 391 (1873); Sims v. Parks, 32 Ind. 363, 363-64 (1869).

[164] *See* Henderson v. Fox, 5 Ind. 489, 491 (1854).

[165] Huston v. First Nat'l Bank, 85 Ind. 21, 28 (1882) (coverture of maker).

[166] *See, e.g.*, Stevens v. Alexander, 82 Ind. 407, 408-09 (1882); Titus v. Seward, 68 Ind. 456 (1879); Bernitz v. Stratford, 22 Ind. 320, 323 (1864).

[167] *See* Bernitz v. Stratford, 22 Ind. 320, 323 (1864).

[168] *See* Titus v. Seward, 68 Ind. 456 (1879).

[169] *See* Brown v. Nichols, Shepard & Co., 123 Ind. 492, 496, 24 N.E. 339, 340 (1890).

[170] U.C.C. § 3-414(1).

of the note. Rather, he is entitled only to the amount paid for it plus interest,[171] with the face amount of the note constituting prima facie evidence of the price paid.[172] The indorser, however, may show that the holder paid him less than the face amount and therefore be liable to the holder only for the amount paid.[173] This result is contrary to the expectation interest of the holder who, when he purchases any note at a discount, anticipates that he will receive the face amount of the note regardless of the amount he paid for it as long as he paid a fair price. Nevertheless, the language of the cases, particularly *Youse v. M'Creary*,[174] which is the seminal case, indicates that the 1861 Act is to be so construed. The court there stated:

> It appears to us, that where the money can not be obtained from the maker of the note, the consideration which moved from the assignor for whatever he receives for the note, thereby fails; and he should then be liable for the value which he had received from the assignee for that consideration, with interest, and the costs of the suit against the maker. . . . The intention of our statute, making the obligations assignable, will be best answered, as we conceive, by this construction.[175]

D. Liability of Irregular Indorsers and Accommodation Parties

The UCC defines an accommodation party as "one who signs the instrument in any capacity for the purpose of lending his name to another party to it."[176] This is typically done by the accommodation party to lend his credit to the party being accommodated, and he may sign either as a maker or an indorser. An irregular indorser is a person whose indorsement appears on the back of the instrument in such a position that it is not in the chain of title.[177] Such an indorsement usually appears prior to the indorsement of the payee and frequently precedes the delivery of the instrument to the payee. Under the UCC, such an indorsement constitutes notice of its accommodation status.[178] There appear to be some

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[171]*See* Schmied v. Frank, 86 Ind. 250, 258 (1882); Huston v. First Nat'l Bank, 85 Ind. 21, 26 (1882); Foust v. Gregg, 68 Ind. 399, 400 (1879); French v. Turner, 15 Ind. 59, 62-63 (1860); Youse v. M'Creary, 2 Blackf. 243, 245-46 (Ind. 1829).

[172]*See* Foust v. Gregg, 68 Ind. 399, 400 (1879); Youse v. M'Creary, 2 Blackf. 243, 245-46 (Ind. 1829).

[173]*See* Foust v. Gregg, 68 Ind. 399, 400 (1879); Youse v. M'Creary, 2 Blackf. 243, 245-46 (Ind. 1829).

[174]2 Blackf. 243 (Ind. 1829).

[175]*Id.* at 245-46.

[176]U.C.C. § 3-415(1).

[177]*See, e.g.*, Horner, *Bills and Notes—Liability of Irregular Indorsers of Non-Negotiable Paper*, 3 J. MAR. L.Q. 62 (1937).

[178]U.C.C. § 3-415(4).

important differences between the rights and duties of accommodation parties on UCC-controlled instruments and those of accommodation parties on non-negotiable instruments transferrable by indorsement under the 1861 Act.

The determination that one is an accommodation party, rather than a maker or indorser, will have a significant effect on his rights and duties both to holders of the instrument and to other parties.[179] For example, a true indorser, who is an assignor or transferor, will be required to pay only after presentment and dishonor in the case of a negotiable instrument,[180] and only after the exercise of due diligence in the case of a non-negotiable instrument.[181] An accommodation party, on the other hand, is in the position of a surety and may be proceeded against directly but he may also assert both special suretyship defenses as well as defenses available to his principal.[182]

Unlike the true indorser, the accommodation indorser will not be required to pay if the maker has a valid defense on the instrument. Moreover, in situations where the accommodation party is not permitted to assert his accommodation status as against the holder of the instrument, he may be able to assert his accommodation status against the maker or other accommodation or accommodated parties and to recover from them by way of contribution or subrogation.[183]

Pursuant to subsection 3-415(3) of the UCC, the accommodation party may show his accommodation status by extrinsic evidence in all cases except those involving a holder in due course who has no notice of the accommodation.[184] Other than the appearance on the instrument of language which so indicates, the only indicator on the instrument itself of accommodation status is an indorsement not in the chain of title, i.e., an indorsement of a stranger to the instrument immediately above the indorsement of the payee or named indorsee.[185] Because there can be no holder in due course of an overdue or otherwise negotiable instrument, accommodation status may be shown by extrinsic evidence on either. This

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[179]*See generally* Annot., 18 A.L.R.3D 647 (1968) (liability of indorser, other than payee or transferee, of non-negotiable instrument).

[180]*See supra* notes 144-46 and accompanying text.

[181]*See supra* notes 152-57 and accompanying text.

[182]*See* U.C.C. §§ 3-415, 3-416, 3-606, and the official comments thereto; WHITE & SUMMERS, *supra* note 51, at §§ 13-14, 13-16, 13-17.

[183]*See* authorities cited *supra* note 182.

[184]U.C.C. § 3-415(3). WHITE & SUMMERS, *supra* note 51, at § 13-13. Section 3-415(3) of the UCC states: "As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof."

[185]U.C.C. § 3-415(4). "An endorsement which shows that it is not in the [chain] of title is notice of its accommodation character." *Id.*

does not appear to be so with regard to some of the non-negotiable instruments controlled by the 1861 Act.

The pre-UCC and pre-NIL cases involving irregular indorsers, "if not full of confusion and contradiction, are, in many respects, variant and difficult to harmonize."[186] The court in *Pool v. Anderson*[187] attempted to clarify the muddle by restating the rules applicable to irregular indorsements and explaining the underlying basis for those rules. In *Pool*, the defendant had written his name on the reverse side of a non-negotiable promissory note prior to its delivery to the plaintiff-payee. The indorser-defendant argued that his irregular indorsement imposed upon him the liability of an indorser, and that there was no excuse for the payee's failure to exercise due diligence in pursuing the makers.

The *Pool* court reaffirmed the rule as initially explained in *Wells v. Jackson*[188] that the irregular indorser of an instrument not negotiable under the law merchant, in the absence of any extrinsic agreement to the contrary, is a surety or joint promisor, whereas the irregular indorser of an instrument negotiable under the law merchant prima facie has the liability only of an indorser.[189] The court explained that an irregular indorser of a note negotiable under the law merchant undertakes that, if the maker fails to pay at maturity and the indorser is notified of the dishonor, he will pay.[190] However, the court reasoned that since an instrument not negotiable under the law merchant is not mercantile paper and one cannot be an indorser of such an instrument in this commercial sense, irregular indorsement of such an instrument cannot create a similar commercial contract. One ordinarily indorses a non-negotiable note in order to transfer title, thereby warranting the validity of the note, the liability of the maker, the maker's ability to pay, and that the indorser will pay if due diligence against the maker is unsuccessful.[191] But the irregular indorser of non-negotiable paper is not transferring title; he is lending his

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[186]Kealing v. Vansicle, 74 Ind. 529, 537 (1881). *See* Pool v. Anderson, 116 Ind. 88, 90-91, 18 N.E. 445, 446 (1888).

[187]116 Ind. 88, 18 N.E. 445 (1888).

[188]6 Blackf. 40 (Ind. 1841).

[189]116 Ind. at 93, 18 N.E. at 447. *Wells* had been overruled in part by Drake v. Markle, 21 Ind. 433 (1863), which held that since every promissory note was negotiable under the 1861 Act, an irregular indorser of any promissory note was presumably bound as an indorser. *See* 116 Ind. at 93-94, 18 N.E. at 447. One of the reasons for this result in *Drake* was, as *Pool* noted, that the court in that case and others had abandoned or overlooked the distinctions between negotiability under the law merchant and under the Act or its predecessors. *Id.* By reaffirming the rule of *Wells v. Jackson* as "logically maintainable, and . . . supported upon principle and authority," *Pool* effectively overruled that portion of *Drake* as to promissory notes not negotiable under the law merchant. *Id.* at 93, 18 N.E. at 447.

[190]*Id.* at 95, 18 N.E. at 448.

[191]*Id.* at 96, 18 N.E. at 448.

name and credit to the maker. Since the note is subject to all of the defenses of the maker under the 1861 Act, the court reasoned that an irregular indorser of non-negotiable paper, who merely lent his credit to the maker, should not be held liable after a successful defense by the maker.[192] The court concluded that such an indorser should be held liable as surety or joint promisor, not as indorser.[193] Because notice of non-payment need not be given to a surety or joint promisor, due diligence or the waiver thereof was not required to be shown. Accordingly, the plaintiff-payee in *Pool* had stated a valid claim against the irregular indorser despite the absence of an allegation that he first exercised due diligence against the maker.[194]

Furthermore, unlike the UCC which permits evidence of accommodation status in all situations except those involving holders in due course without knowledge,[195] cases under the 1861 Act permit extrinsic evidence in an action by the holder to collect only where the indorsement is irregular. In such an action, extrinsic evidence will not be allowed to establish the accommodation status of a party whose signature appears properly in the chain of title or is regularly located.[196] Thus, where the indorsement of the named payee appeared in its proper place on the reverse side of the note,[197] or the indorsement of the alleged accommodation indorser appeared below that of the payee,[198] parol evidence was inadmissible as against the holder to vary the contract of the party claiming accommodation status.

As between the parties on the instrument, extrinsic evidence is admissible to adjust their respective liabilities, whether the instrument is negotiable under the law merchant or not, and whether the signature of the alleged accommodation party is regular or irregular, because the agreement between sureties and principals is collateral to the instrument and not part of it.[199] Consequently, even though a party's signature appears

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[192]*Id.* at 96-97, 18 N.E. at 448. *Accord* Hubbard v. First State Bank, 67 Ind. App. 47, 60-63, 114 N.E. 642, 646-47 (1917) (the irregular indorser of a non-negotiable note argued unsuccessfully that he was only an indorser and was discharged by the holder's failure to exercise due diligence); Oyler v. McMurray, 7 Ind. App. 645, 34 N.E. 1004 (1893) (irregular indorser successfully contended that his position was that of surety and that the extension of time on the note beyond the initial extension to which he had agreed, given without his knowledge, stated a valid defense to the holder's action on the note).

[193]116 Ind. at 96-97, 18 N.E. at 448.

[194]*Id.* at 97, 18 N.E. at 449.

[195]U.C.C. § 3-415(3).

[196]*See, e.g.*, Stack v. Beach, 74 Ind. 571, 574 (1881); Armstrong v. Harshman, 61 Ind. 52, 54-55 (1877); Holton v. McCormick, 45 Ind. 411, 415 (1873); Snyder v. Oatman, 16 Ind. 265, 266 (1861); Vore v. Hurst, 13 Ind. 551, 557 (1859).

[197]*See* Holton v. McCormick, 45 Ind. 411, 415 (1873); Harshman v. Armstrong, 43 Ind. 126, 130 (1873).

[198]*See* Vore v. Hurst, 13 Ind. 551, 557 (1859).

[199]*See, e.g.*, Porter v. Waltz, 108 Ind. 40, 42, 8 N.E. 705, 706 (1886); Houck v. Graham, 106 Ind. 195, 199, 6 N.E. 594, 596 (1886); Horn v. Bray, 51 Ind. 555, 563-64 (1875); Schooley v. Fletcher, 45 Ind. 86, 88-89 (1873).

as that of a maker of the note and there is nothing on the note itself to indicate that he was acting as an accommodation party, he may show that he signed as an accommodation or surety for the other makers of the note,[200] as surety for the makers and co-surety with indorsers,[201] or as surety for the maker and co-surety with the payee-indorsers.[202]

The net effect is that if an instrument appears to be regular, i.e., bears no irregular indorsement or indicative language, the holder in due course of a negotiable instrument and the holder of a non-negotiable instrument will not be subject to suretyship defenses of an alleged accommodation party. The holder of an overdue or otherwise negotiable instrument, however, will be subject to those defenses. Looking at the situation from the perspective of an accommodation party, such a party on a UCC-controlled instrument will always be able to prove his accommodation status as against a holder-plaintiff other than a holder in due course without notice. But the accommodation party on a non-negotiable instrument will be able to prove his status only if he is an irregular indorser. In all cases, however, the relationship of the parties on the instrument inter se may be shown by extrinsic evidence. Once again, the holder of the overdue or otherwise negotiable instrument has a less secure position than that of the holder of a non-negotiable instrument.

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[200]*See* Porter v. Waltz, 108 Ind. 40, 8 N.E. 705 (1886).

[201]*See* Houck v. Graham, 106 Ind. 195, 6 N.E. 594 (1886).

[202]*See* Harshman v. Armstrong, 43 Ind. 126 (1873). In *Harshman*, the original maker persuaded one party to co-sign as maker and the other parties to sign as indorsers before the names of the payees had been inserted. The original maker then inserted the indorsers' names as payees. Because the parties appeared in their regular positions on the note, the court observed that the subsequent indorsee could not have maintained an action against the payees as co-sureties. *Id.* at 130. But the actual relationship between the parties themselves, in this action for contribution, could be shown by parol evidence. *Id.* at 130-31. The court ruled that the complaint did state a cause of action in favor of the accommodation maker against the payee-indorsers and remanded the case for trial. In a second appeal involving the same promissory note, Armstrong v. Harshman, 61 Ind. 52 (1878), the court cast serious doubt on its earlier ruling when it said that "parol evidence can not be given to show, that, by thus placing their names upon the note, they [the payee-indorsers] intended to contract a different liability from that which the law attaches to the contract as made by them." *Id.* at 55. However, the court's decision was based on the determination that there had been no evidence of an agreement that the payees would be co-sureties with the accommodation maker and that the theory on which the case had been tried, that there need be no such agreement, was incorrect. *Id.* at 55-56. The court did not actually decide the extrinsic evidence issue nor was it called upon to do so. *See* Houck v. Graham, 106 Ind. 195, 199, 6 N.E. 594, 597 (1886). And when the case came before the court a third time, Armstrong v. Harshman, 93 Ind. 216 (1883), after the trial court found on the evidence that the payee-indorsers had agreed to be co-sureties with the accomodation maker, the supreme court affirmed entry of judgment against the payee-indorsers. The court stated that with respect to the second appeal, "it was held that the evidence was not sufficient as to an express contract," *id.* at 218, thus supporting the concluson in *Houck* that the second decision on appeal did not affect the prevailing rule as to the relationship between parties to an instrument.

IV. Observations and Recommendations

With the 1861 Act creating rights and duties different from those created by both the UCC and the common law, what justification was there for retention of the Act? The expressly stated purposes of the UCC are "to simplify, clarify and modernize the law governing commercial transactions; to permit continued expansion of commercial practices . . .; [and] to make uniform the law among the various [states]."[203] Why, in 1963, would a state legislature, intent on modernizing the law of negotiable instruments by replacing the fifty-year-old NIL with a new UCC, perpetuate the existence of a century-old statute whose antecedents date back to 1818 in Indiana and to a British statute enacted in 1704 as a codification of the then prevailing law merchant?

In the absence of Indiana legislative history, the only answer the author has been able to discover is, according to a leader in the movement to adopt the UCC in Indiana, a desire to preserve the concept of the "quasi-negotiable" instrument.[204] One scholar has described this reasoning as follows:

> The phrase "*quasi* negotiable" has been termed an unhappy one; and certainly it is far from satisfactory, as it conveys no accurate, well-defined meaning. But still it describes better than any other shorthand expression the nature of those instruments which, while not negotiable in the sense of the law merchant, are so framed and so dealt with, as frequently to convey as good a title to the transferee as if they were negotiable.[205]

In the great majority of cases, the concept of quasi-negotiability has been applied to such things as corporate or government securities,[206] documents

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[203]U.C.C. § 1-102(2).

[204]Interview with R. Bruce Townsend, Cleon H. Foust Professor of Law (now emeritus), Indiana University School of Law—Indianapolis, Spring, 1982. Professor Townsend was involved in the final stages of drafting the Uniform Commercial Code and was an important force in the adoption of the UCC in Indiana. For an exhaustive and definitive comparison of the prior Indiana law with the then newly proposed UCC, see Pratter & Townsend, *supra* note 28.

[205]3 J. Daniel, A Treatise on the Law of Negotiable Instruments § 2093 (7th ed. 1933) (footnote omitted). *Accord* National Bank of Savannah v. Kershaw Oil Mill, 202 F. 90, 94 (4th Cir. 1912).

[206]*See, e.g.*, First Nat'l Bank v. Mayor & City Council of Baltimore, 27 F. Supp. 444, 452-53 (D. Md. 1939), *aff'd*, 108 F.2d 600 (4th Cir. 1940) (city's certificates of indebtedness); Real-Estate Trust Co. v. Bird, 90 Md. 229, 231, 44 A. 1048, 1050 (1899) (corporate stock); Austin v. Hayden, 171 Mich. 38, 50, 137 N.W. 317, 322 (1912) (corporate stocks and bonds); 3 J. Daniel, *supra* note 204, at § 2093; Aigler, *Recognition of New Types of Negotiable Instruments*, 24 Colum. L. Rev. 563, 584-85 (1924); Elliott, *Negotiability of Highway Improvement Bonds*, 2 Ind. L.J. 264 (1926); *Good Faith Purchase*, *supra* note 24, at 1072-73; *Confessions, supra* note 24, at 610; Note, *Estoppel—Non-Negotiable Instruments—Bona Fide Purchase of County Warrants Endorsed in Blank—Reliance on Indicia of Ownership*, 8 Minn. L. Rev. 526, 528-29 (1924).

of title (warehouse receipts and bills of lading),[207] and consumer paper.[208] This is usually because of common law development, specifically directed statutory provisions,[209] or self-contained language.[210] In the modern commercial context, most, if not all, of the paper classified as quasi-negotiable is regulated by specifically applicable statutes,[211] rather than by legislation of general applicability such as the 1861 Act.

When the NIL was in effect, instruments were either negotiable or not. There was no in-between area for instruments not quite meeting the NIL requirements for negotiability.[212] Nevertheless, a concept of quasi-negotiability was apparently necessary for those instruments intended to be reasonably freely transferrable in the commercial context and to effectuate the statutory or contractual provisions making them so, but not necessarily to the point of granting holder in due course status.[213]

The adoption of the UCC, particularly sections 3-104 and 3-805, has changed the all or nothing position of the NIL and has created the UCC's own quasi-negotiable instrument in the form of the otherwise negotiable

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[207]*See, e.g.*, National Bank of Savannah v. Kershaw Oil Mill, 202 F. 90, 94 (4th Cir. 1912) (bills of lading); 3 J. DANIEL, *supra* note 205, at §§ 2060, 2083-92, 2112 (the last section dealing with warehouse receipts, the balance with bills of lading); Aigler, *supra* note 206, at 584-85; *Good Faith Purchase, supra* note 24, at 1076-81; *Confessions, supra* note 24, at 610.

[208]*See, e.g., Good Faith Purchase, supra* note 24, at 1093-1107; Comment, *Partial Negotiability of Irregular Instruments*, 33 YALE L.J. 302 (1924); *cf.* Kripke, *Chattel Paper as a Negotiable Specialty under the Uniform Commercial Code*, 59 YALE L.J. 1209 (1950).

[209]*E.g.*, The Uniform Stock Transfer Act, The Uniform Bills of Lading Act, The Uniform Warehouse Receipts Act, The Uniform Conditional Sales Act (all of which have been superseded by the UCC). *See* 3 J. DANIEL, *supra* note 205, at § 2102; *Good Faith Purchase*, *supra* note 24, at 1075-81; *Confessions*, *supra* note 24, at 610. In Aetna Trust & Sav. Co. v. Nackenhorst, 188 Ind. 621, 630, 122 N.E. 421, 424 (1919), the court noted that the sewer assessment bonds involved had been made negotiable as inland bills of exchange by specific statutory provision. Similarly, in Farmers' Bank v. Orr, 25 Ind. App. 71, 80, 55 N.E. 35, 38 (1899), gravel road certificates had been made assignable as promissory notes by statute.

[210]*See* Comment, *supra* note 208, at 308.

[211]*See, e.g.*, UCC Articles 7 (warehouse receipts and bills of lading), 8 (corporate securities) and 9 (secured transactions, including chattel paper). *See generally* Kripke, *supra* note 208.

[212]*See* Britton, *supra* note 132 (the NIL required that an instrument *must* comply with its terms to be negotiable).

[213]One author observed that, notwithstanding the total occupation of the field of negotiable instruments by the NIL, the quasi-negotiability of promissory notes payable in specifics such as farm crops, although not negotiable under the NIL and "a generally undesirable type of commercial paper," was "very helpful in farm financing" in Georgia. Culp, *supra* note 8, at 292. Notes used for such purposes today would probably be governed by the secured transactions provisions of the UCC Article 9. *See also* Francis, *Do Some of the Major Postulates of the Law of Bills and Notes Need Re-Examination?* 14 CORNELL L.Q. 41, 47-48 (1928), where the author suggests that "hop checks," a form of scrip given to pickers of hops as payment for their work, would probably have been held negotiable, notwithstanding the NIL, because of the manner in which the pickers dealt with them.

instrument. This particular development was somewhat controversial, with some commentators condemning the departure from the rigidity and certainty of the NIL and others praising it.[214] One author has suggested that the UCC did not go far enough and should apply to all instruments, negotiable or not,[215] thus echoing a much earlier suggestion that the move should be away from a distinction between negotiable and non-negotiable instruments.[216] More recently, there have been challenges directed to the entire concept of negotiability.[217]

Regardless of the UCC's perceived merits or defects, it clearly evidences an intention to liberalize the availability of some characteristics of negotiability to instruments or documents outside its purview, ostensibly by common law development, perhaps by development of a new law merchant. By retaining the 1861 Act, however, the Indiana legislature has evidenced an intention to make such characteristics available by statute rather than by leaving the developments entirely to the growth of the common law through a new law merchant. Having opted to preserve the concept of quasi-negotiability for instruments presently outside the pale of the UCC, there seems to be no good reason why the transfer of such instruments cannot be governed by the same rules which govern the transfer of overdue and otherwise negotiable instruments within the UCC. In this way, parties to a non-negotiable instrument will possess the same rights and liabilities as parties to overdue or otherwise negotiable instruments, thereby endowing the applicable law with more certainty and eliminating the disadvantages suffered by some instruments under the UCC when compared with instruments under the 1861 Act.

Accordingly, the author suggests that the 1861 Act be repealed and replaced with a statute which states merely:

> All instruments in writing, signed by any person, in which said person promises to pay money or acknowledges money to be due, and which does not comply with the requirements of negotiability set forth in the Uniform Commercial Code, shall be transferrable pursuant to the rules established by the Uniform Commercial Code, except that there shall be no holder in due course of such instruments.[218]

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[214]*Compare Britton, supra* note 132, at 1-4 (while generally praising the new Article 3, decrying the UCC's move away from the rigid policy of the NIL toward a more liberal policy of making instruments lacking words of negotiability "semi-negotiable,") *with Good Faith Purchase, supra* note 24, at 1107-08 (lamenting the "strait-jacket" created by the NIL and praising the UCC's more liberal approach).

[215]*See* Note, *supra* note 15, at 223.

[216]*See* Goodrich, *supra* note 50, at 85.

[217]*See* Rosenthal, *Negotiability—Who Needs It?* 71 COLUM. L. REV. 375 (1971). Even Gilmore questioned the doctrine of negotiability and the creation of a holder in due course. *See Confessions, supra* note 24, at 619.

[218]As noted at the outset, § 1 of the 1861 Act also applies to promises to deliver or

By replacing the 1861 Act with such a provision the legislature truly will have modernized the law applicable to commercial transactions while at the same time preserving the concept of quasi-negotiability within the most effective rules developed to date.

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convey property or to perform acts. *See supra* note 36. There appears no need to preserve quasi-negotiability of such promises by a statute of general application in view of the specific statutes now applicable. *See supra* note 209 and accompanying text. Instruments containing such promises not subject to specific statutory control would just as well be served by the continually developing common law of assignment and delegation.

Notes

Labor Law Preemption After *Belknap, Inc. v. Hale*: Has Preemption as Usual Been Permanently Replaced?

I. Introduction

Federal labor law preemption is, theoretically, a simple concept. Congress has mandated that labor-management relations be governed under a federal body of law known as the National Labor Relations Act (NLRA).[1] To provide necessary uniformity in the control of labor-management relations,[2] state interference with the federal scheme has been precluded.[3] Despite this need for uniformity, the United States Supreme Court and the National Labor Relations Board (NLRB), the body created by Congress to administer the NLRA,[4] have recognized certain situations in which state causes of action are not preempted by the federal Act.[5] In practice, however, labor law preemption has been a complex and difficult area. The problems have arisen in the judicial determination of the boundary lines between state or concurrent jurisdiction and exclusive federal jurisdiction.[6]

Belknap, Inc. v. Hale[7] is the United States Supreme Court's latest pronouncement of the labor law preemption doctrine. In *Belknap*, the Court found that the NLRA did not preempt state causes of action for misrepresentation and breach of contract brought against an employer by non-union former employees. The employees had been hired to

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[1]29 U.S.C. §§ 141-87 (1976). The current version of the NLRA is composed of the National Labor Relations Act (Wagner Act), ch. 372, 49 Stat. 449 (1935), as amended by the Labor-Management Relations Act (Taft-Hartley Act), ch. 120, 61 Stat. 136, (1947), and the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), Pub. L. No. 86-257, 73 Stat. 519. The present NLRA has also been subject to numerous minor amendments. *See, e.g.*, Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395.

[2]A uniform body of labor law is necessary to effectively protect rights granted under the NLRA from erosion in state courts and legislatures. *See, e.g.*, Vandeventer v. Local 513, Int'l. Union of Operating Engineers, 579 F.2d 1373 (8th Cir.), *cert. denied*, 439 U.S. 984 (1978).

[3]*See, e.g.*, Tyree v. Edwards, 287 F. Supp. 589 (D. Alaska 1968), *aff'd sub nom.* Alaska v. Local 302, Int'l Union of Operating Engineers, 393 U.S. 405 (1969).

[4]29 U.S.C. §§ 141-87 (1976).

[5]*See, e.g.*, UMW v. Gibbs, 383 U.S. 715 (1966); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

[6]*See* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972) [hereinafter cited as *Revisited*.]

[7]103 S. Ct. 3172 (1983).

permanently replace striking workers and were later dismissed to accommodate returning strikers.[8]

The Court examined two preemption doctrines and their exceptions but failed to explicitly rely upon any single reason for the result.[9] This Note will first examine preemption historically, and as applied to the facts of the *Belknap* case. The *Belknap* decision's effect upon a variety of issues in labor preemption will then be analyzed. These issues include the importance of third parties to the labor contract and parties' rights in labor disputes. Finally, the Note will discuss *Belknap's* effect upon the preemption doctrine.

II. Labor Law Preemption: Past and Present

A. Preemption Before Belknap

1. State Jurisdiction Before the Modern Era of Preemption.—The supremacy clause of the United States Constitution[10] dictates that states may not pass or enforce laws in conflict with the substantive rights granted by federal law.[11] By enacting the National Labor Relations Act,[12] Congress exhibited clear intent to regulate certain aspects of labor-management relations. Section 7 of the NLRA protects specified kinds of employee conduct from interference by employers.[13] Section 8 prohibits certain conduct of both employers and employees.[14] Conduct which interferes with section 7 rights or which is prohibited by section 8 results in an unfair labor practice, triggering the NLRB's power to grant certain remedies to aggrieved parties.[15]

Prior to 1959, the United States Supreme Court developed a philosophical inconsistency regarding the extent of state jurisdiction over labor disputes.[16] The case which laid the foundation for this inconsistency was *UAW v. Wisconsin Employment Relations Board*,[17] better known as the *Briggs-Stratton* case.

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[8] *Id.* at 3175-76.

[9] *See infra* notes 92-110 and accompanying text.

[10] U.S. Const. art. VI, cl. 2.

[11] *See, e.g.*, Edgar v. MITE Corp., 102 S. Ct. 2629 (1982); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Miles v. Illinois Cent. R.R., 315 U.S. 698 (1942); *see also Revisited, supra* note 6, at 1341.

[12] 29 U.S.C. §§ 141-87 (1976).

[13] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities . . . ." 29 U.S.C. § 157 (1976).

[14] 29 U.S.C. § 158 (1976). Section 8(a) concerns employers' conduct while § 8(b) describes prohibited conduct of labor organizations. *Id.*

[15] These remedies include cease-and-desist orders, reinstatement of wrongfully discharged employees and awards of back pay. The NLRB's orders are enforced by the United States District Courts. 29 U.S.C. § 160 (1976).

[16] *See infra* notes 18-33 and accompanying text.

[17] 336 U.S. 245 (1949).

In *Briggs-Stratton*, a union's tactic for pressuring the employer called for a long series of unannounced meetings of uncertain duration, designed to have greater effect upon the employer's business than would a strike.[18] Although these work stoppages were unfair labor practices under state law,[19] the United States Supreme Court found the conduct to be neither protected nor prohibited by the NLRA.[20] The Court allowed a state injunction to stand, refusing to hold that the NLRA preempted the state statute.[21] The Court reasoned that congressional silence could not be interpreted as condoning the conduct, and concluded that the state must have jurisdiction because the conduct would otherwise go ungoverned.[22] *Briggs-Stratton* generalized that unprotected and unprohibited conduct not governed by the NLRA is within state control.[23]

Four years later, in *Garner v. Teamsters Local 776*,[24] the United States Supreme Court impliedly recognized that statutory and NLRB silence regarding certain activity did not necessarily require a finding of state jurisdiction. In *Garner*, union members who were not employees picketed an employer to persuade the company to influence its employees to join the union.[25] The employer won an injunction in state court because the picketing violated the state labor relations statute.[26] The Court found that the conduct was prohibited by section 8 of the NLRA, and was, therefore, within the NLRB's jurisdiction.[27] The Court held that the state was precluded from providing relief to the employer,[28] noting that the conflicting remedies in state and NLRB proceedings justified preemption here.[29]

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[18] *Id.* at 249.

[19] Wisconsin Employment Peace Act, WIS. STAT. § 111.06(2) (1947).

[20] 336 U.S. at 253. In examining preemption under the NLRA, the Court considered there to be basically three classes of conduct: conduct protected by § 7 of the NLRA, conduct prohibited by § 8, and conduct neither protected by § 7 nor prohibited by § 8. *See, e.g.*, UAW v. O'Brien, 339 U.S. 454 (1950) (involving conduct protected by § 7); Garner v. Teamsters Local 776, 346 U.S. 485 (1953) (involving conduct prohibited by § 8). *See generally Revisited, supra* note 6, at 1340. Under modern analysis, still ten years in the future, the conduct may have been both arguably protected by § 7 and arguably prohibited by § 8. *See infra* notes 35-46 and accompanying text.

[21] 336 U.S. at 264-65. *See Revisited, supra* note 6, at 1347.

[22] 336 U.S. at 254.

[23] *Id.* at 246-47. *See also Revisited, supra* note 6, at 1347-48.

[24] 346 U.S. 485 (1953).

[25] *Id.* at 487.

[26] Pennsylvania Labor Relations Act, PA. STAT. ANN. tit 43, § 211.6 (Purdon 1952).

[27] 346 U.S. at 488. Unlike *Briggs-Stratton*, the Court in *Garner* avoided adjudicating whether the conduct in issue was actually prohibited by the NLRA. Instead, the Court noted that "Congress has taken in hand this particular type of controversy . . . . The power and duty of primary decision lies with the [NLRB], not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance . . . ." *Id.* at 488-89. Under modern preemption analysis, the conduct involved in *Garner* may have been better classified as arguably prohibited. *See infra* notes 35-46 and accompanying text.

[28] 346 U.S. at 501.

[29] *Id.* at 498.

The conflict lies in remedies, not rights. The same picketing may injure both

Although facially reconcilable because *Briggs-Stratton* involved conduct neither protected by section 7 of the NLRA nor prohibited by section 8[30] while *Garner* concerned activity prohibited by section 8,[31] the cases were inconsistent philosophically. *Briggs-Stratton* generalized that conduct not regulated by the NLRA must be left to state control.[32] Conversely, *Garner* recognized that Congress could indicate, through statutory silence, that certain kinds of conduct are beyond state control, even if not expressly regulated by the NLRA.[33] In 1959 the United States Supreme Court was faced with a case which required further subdivision of conduct under the NLRA in order to avoid the conflict between the foundations of *Briggs-Stratton* and *Garner*. *San Diego Building Trades Council v. Garmon*[34] marked the beginning of the modern approach to preemption.

2. Garmon *and the Modern Approach: The Birth of "Arguable" Conduct.*—In *San Diego Building Trades Council v. Garmon*,[35] the United States Supreme Court was presented with facts which highlighted the inconsistent philosophies of *Briggs-Stratton* and *Garner*.[36] The result was a new preemption doctrine.

> public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent. It must be remembered that petitioners' state remedy was a suit for an injunction prohibiting the picketing. The federal Board, if it should find a violation of the [NLRA], would issue a cease-and-desist order and perhaps obtain a temporary injunction to preserve the *status quo*. Or if it found no violation, it would dismiss the complaint, thereby sanctioning the picketing. To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue, or that the State's temporary injunction will be dissolved as soon as the federal Board acts. But experience gives no assurance of either alternative, and there is no indication that the [NLRA] left it open for such conflicts to arise.

Id. at 498-99 (footnote omitted). The Court did, however, recognize as an exception the state's interest in restraining violent conduct. *Id.* at 488. Thus, the Court's premise in *Garner* was that, as a general rule, dual jurisdiction was unworkable due to the resulting diversities and conflicts that would frustrate the congressional purpose of a uniform national body of labor law. *Id.* at 500.

[30] *See supra* note 20 and accompanying text.

[31] *See supra* note 27 and accompanying text.

[32] *See supra* note 23 and accompanying text.

[33] 346 U.S. at 500. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Id.* *Briggs-Stratton* survived for many years as an anomaly in preemption law. Prior to *Belknap*, every case since *Briggs-Stratton* followed *Garner's* philosophy, which allows for a zone of unregulated conduct. No direct conflict with *Briggs-Stratton* arose until International Assn. of Machinists v. Wisconsin Employment Relations Comm., 427 U.S. 132 (1976), which carried the *Garner* philosophy to a fact situation more like that of *Briggs-Stratton*. *See infra* notes 47-68 and accompanying text.

[34] 359 U.S. 236 (1959).

[35] *Id.*

[36] *See supra* notes 30-33 and accompanying text.

Garmon involved a union's picketing to pressure an employer to recognize a closed shop[37] despite the company's insistence that the employees desired to remain non-union.[38] The company successfully sued in state court to enjoin the picketing and for damages to compensate for business losses attributable to the union's activity.[39]

The Court was unable to follow either *Briggs-Stratton* or *Garner* without overruling or severely damaging the other.[40] The conduct's classification was unclear. The Court refused to hold that the conduct was protected by section 7 of the NLRA or prohibited by section 8, noting that such a finding was exclusively within the jurisdiction of the NLRB.[41] The Court was, therefore, unable to follow *Garner*, which had involved conduct prohibited by section 8, without overruling *Briggs-Stratton*.[42] To follow *Briggs-Stratton* would have been an equally unpleasant solution,

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[37]The union desired an agreement with the employer to the effect that only employees who belonged to the union or those who applied for membership within thirty days would be permitted to remain employed. 359 U.S at 237.

[38]*Id.*

[39]*Id.* at 237. The United States Supreme Court held that federal law preempted the equitable claim in San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957), and remanded the damages claim to the state court, where it was upheld. Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958). The *Garmon* doctrine was announced when the Court subsequently reviewed the damages judgment. 359 U.S. 236 (1959). Simultaneously with the commencement of the state suit, the employer began a representation proceeding before the NLRB so that the employees would have the opportunity to vote for or against representation by the union. *Id.* at 238. The Board declined to hear the case "presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction." *Id.*

[40]*Revisited*, *supra* note 6, at 1348-49.

[41]The court stated:

> At times it has not been clear whether the particular activity . . . was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the [NLRA] that these determinations be left in the first instance to the [NLRB].
>
> The case before us is such a case.

359 U.S. at 244-45. The NLRB's primary jurisdiction over conduct governed under the NLRA was recognized before *Garmon*. Six years earlier, the Court, in *Garner*, noted:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.

346 U.S at 490. By 1959, *Briggs-Stratton's* view of the NLRB's jurisdiction was clearly out of favor. In *Garmon*, the Court noted that "the approach taken in [Briggs-Stratton], in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." 359 U.S. at 245 n.4.

[42]*Revisited*, *supra* note 6, at 1348-49. *See supra* notes 17-33 and accompanying text.

because to do so would have been inconsistent with *Garner's* philosophy.[43]

The Court's solution was to further subdivide the categories of conduct. In addition to conduct clearly protected by section 7 of the NLRA or prohibited by section 8 and conduct clearly not protected or prohibited, the Court now recognized conduct arguably protected or prohibited. *Garmon* did not affect preemption cases involving the former two categories of conduct.[44] Rather, *Garmon's* significance was in the Court's holding that "[w]hen an activity is arguably subject to section 7 or section 8 of the [NLRA], the states as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted."[45] It is this standard, that state causes of action will be preempted if they involve conduct actually or arguably protected by section 7 or prohibited by section 8, that is known as the *Garmon* doctrine.[46]

Subsequent to *Garmon* there remained a dividing line in the spectrum of conduct. Prior to *Garmon*, that line was drawn between conduct that clearly was subject to the protections of the NLRA's section 7 or the prohibitions imposed by section 8, and activity that clearly was not. *Garmon* recognized that labor and management conduct was not always amenable to classification in such absolute terms. The Court, therefore, shifted the dividing line, placing conduct actually or arguably subject to section 7 or section 8 of the NLRA on one side and all other conduct on the opposite side. Both sides of this line have been subject to change. The side of preemption analysis involving the former category of conduct became confused in *Sears, Roebuck & Co. v. San Diego District Council of Carpenters.*[47] The latter category, at the time of *Garmon*, had been controlled by *Briggs-Stratton.*[48] Subsequently, *Briggs-Stratton* was replaced

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[43]*See supra* notes 30-33 and accompanying text. *See also Revisited, supra* note 6, at 1349.

[44]Conduct clearly unprotected or unprohibited was not addressed in *Garmon*. Thus, *Briggs-Stratton* remained intact although severely limited in its application. 359 U.S. at 245 n.4. Also, the Court reaffirmed that activity clearly subject to § 7 or § 8 of the NLRA called for preemption. *Id.* at 244.

[45]*Id.* at 245.

[46]*Revisited, supra* note 6, at 1349. *See generally* Brody, *Labor Preemption Again—After the Searing of Garmon*, 13 S.W.U.L. REV. 201 (1982); Cox, *Recent Developments in Labor Law Preemption*, 41 OHIO ST. L.J. 277 (1980) [hereinafter cited as *Recent Developments*]. Although the doctrine was broadly stated, the Court in *Garmon* recognized exceptions to preemption where "the activity regulated was a merely peripheral concern of the . . . Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the states of the power to act." 359 U.S. at 245.

[47]436 U.S. 180 (1978). *See infra* notes 59-76 and accompanying text.

[48]This category was conduct clearly not subject to § 7 or § 8 of the NLRA. *Briggs-Stratton* operated such that when this kind of conduct was involved, the NLRA would not preempt state law. *See supra* notes 17-23 and accompanying text.

with a new rule in *International Association of Machinists v. Wisconsin Employment Relations Commission.*[49]

3. Machinists *and* Sears: *The Complications Set In.—a.* Machinists: *No state interference with economic weapons.—Machinists* broke new ground by explicitly overruling *Briggs-Stratton's* holding that conduct clearly not protected by section 7 of the NLRA or prohibited by section 8 was necessarily within the jurisdiction of the states.[50]

Machinists involved union members' concerted refusal to work overtime during contract negotiations with the employer. The employer filed an unfair labor practice charge with the NLRB and also filed a complaint with the Wisconsin Employment Relations Commission (WERC). The federal unfair labor practice charge was dismissed by the NLRB, which found no violation of the NLRA.[51] The union's activity did, however, constitute an unfair labor practice under state law.[52] The Court held that the state cause of action was preempted and, in so holding, overruled *Briggs-Stratton.*[53] The majority in *Machinists* focused upon "whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.' "[54] The crucial inquiry was "whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the

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[49]427 U.S. 132 (1976). *See infra* notes 50-57 and accompanying text.

[50]In so holding, the Court extended the philosophy enunciated in Teamsters Local 20 v. Morton, 377 U.S. 242 (1964). In *Morton*, the union had gone on strike and also engaged in activities designed to induce the employer's suppliers and customers to cease doing business with the employer. *Id.* at 255. This was a kind of secondary boycott which Congress had scrutinized but which it had not proscribed in the 1959 amendments to the NLRA. *Id.* at 259-60. *See generally* Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), Pub.L. No. 86-257, 73 Stat. 519 (1959). Although the conduct was neither protected by § 7 nor prohibited by § 8 of the NLRA, the United States Supreme Court reasoned that Congress had intended this activity to remain available to parties to a labor dispute. 377 U.S. at 258. The Court refused to allow the state to prohibit the conduct because to have held otherwise would have upset the balance of bargaining power between management and labor sought to be achieved by the NLRA. *Id. Briggs-Stratton* was impliedly distinguished in that *Morton* involved clear congressional intent to leave this kind of conduct available to labor disputants. *Revisited, supra* note 6, at 1352. Thus, the Court was not barred from holding that the NLRA preempted the state statute. Professor Cox foresaw the potential for broad application of the *Morton* principle, essentially an extension of *Garner*, to cover conduct not protected or prohibited, four years before the *Machinists* decision. *Id.*

[51]427 U.S. at 135.

[52]*Id. See* Wisconsin Employment Peace Act, WIS. STAT. § 111.06(2) (1974). The WERC's position was that because the conduct was neither arguably protected by § 7 nor prohibited by § 8 of the NLRA, the state was not preempted from issuing a cease and desist order. 427 U.S. at 135.

[53]427 U.S. at 154. *Briggs-Stratton* had held that if conduct was not protected by § 7 nor prohibited by § 8, it was necessarily within state jurisdiction. *See supra* notes 17-23 and accompanying text.

[54]427 U.S. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

Act's processes.' "[55] The Court reasoned that because Congress had enacted a comprehensive body of labor law and had been specific in outlawing the use of certain economic weapons,[56] congressional silence could not be interpreted as an indication of approval of state interference with other such weapons.[57] Until *Belknap, Inc. v. Hale*,[58] *Machinists* represented the last word on whether state laws or suits involving conduct neither protected nor prohibited by the NLRA would be preempted.

b. Sears: *What happened to* Garmon?—Although *Machinists* was limited to the neither protected nor prohibited side of preemption analysis, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*[59] examined the arguably or actually protected or prohibited side. *Sears* recognized *Garmon* as controlling,[60] but injected uncertainty into the future application of the *Garmon* doctrine.

Sears involved non-employee union members' trespassory picketing upon the employer's private property.[61] The employer successfully sued in state court to enjoin a continuing trespass. The California Supreme Court reversed the judgment, holding that the picketing was both arguably protected by section 7 and arguably prohibited by section 8 of the NLRA and that the state injunction was therefore preempted under *Garmon*.[62] The employer brought the case before the United States Supreme Court. The Court was faced with a dilemma. The conduct was both arguably protected under section 7[63] and arguably prohibited under section 8,[64] thus

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[55]427 U.S. at 147-48 (quoting Railroad Trainment v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)).

[56]An economic weapon is the right to engage in self-help activities, sanctioned by the NLRA, and is designed to put pressure upon the opposing party in a labor dispute. A well-known example is the right to strike.

[57]427 U.S. at 143-48. The Court did, however, recognize the *Garmon* exceptions of local interest and peripheral concern, as well as the state's interest in policing violence. *Id.* at 136-37. *See supra* note 46. Justice Powell and Chief Justice Burger concurred with the understanding that the states would remain free to enforce "neutral" state laws in the context of a labor dispute. 427 U.S. at 155-56. Neutral state laws were defined as "state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength." *Id.* at 156. This concurring opinion was necessary in reaching a majority. Justices Stevens, Stewart and Rehnquist dissented and would not have overruled *Briggs-Stratton*. *Id.*

[58]103 S. Ct. 3172 (1983).

[59]436 U.S. 180 (1978).

[60]*Id.* at 187-88.

[61]*Id.* at 182. The Sears store was situated in the center of a large lot and was surrounded by sidewalks and ample parking area. The pickets occupied the sidewalk adjacent to the store and also the adjoining parking lot. The picketing's purpose was to protest the use of non-union labor in the remodeling project. *Id.*

[62]Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 17 Cal. 3d 893, 553 P.2d 603, 132 Cal. Rptr. 443 (1976).

[63]The union's action would have been protected by § 7 if the sole purpose of the picketing had been to pressure the employer into applying area union labor standards to its non-union employees. 436 U.S. at 186-87.

[64]The picketing may have been prohibited by § 8 if the object was to force the employer

Garmon pointed to preemption.[65] A finding of preemption, however, would have practically denied a remedy to Sears because it could not have challenged the trespassory nature of prohibited picketing,[66] and it could not challenge protected picketing at all.[67]

The Court adhered to *Garmon's* basic purpose of protecting the NLRB's primary jurisdiction. The Court stated, however, that it is only where

> the controversy presented to the state court is identical to . . . that which could have been, but was not, presented to the [NLRB] . . . that a state court's exercise of jurisdiction necessarily involves a risk of interference with the . . . jurisdiction of the [NLRB] which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.[68]

The Court found that the controversy before the state court differed from that which could have been presented to the NLRB because the federal issue would have been concerned with the objective of the picketing while the state cause of action examined the picketing location.[69] The Court reasoned, therefore, that "permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the [NLRB's] primary jurisdiction to enforce the statutory prohibition against unfair labor practices."[70]

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to assign work to employees from a particular labor organization or to force Sears to bargain with the union where Sears' employees had not agreed to be represented by the union. *Id.* at 185-86.

[65]Brody, *supra* note 46, at 214-16. *Garmon* calls for preemption when the conduct in issue is actually or arguably protected by § 7 or prohibited by § 8 of the NLRA. Although *Garmon* recognized exceptions where the conduct was a peripheral concern of the NLRA and where the activity touched interests deeply rooted in local feeling and responsibility, these exceptions were of no use to the Court in *Sears*. The peripheral concern exception was not applicable given the Act's central concern with picketing. Further, the local feeling exception has never been extended to include conduct protected by the NLRA. Brody, *supra* note 46, at 214-16.

[66]"[I]f Sears had filed an unfair labor practice charge against the union, the [NLRB's] concern would have been limited to the question whether the Union's picketing had an objective proscribed by the [NLRA]; the location of the picketing would have been irrelevant." 436 U.S. at 186.

[67]Broady, *supra* note 46, at 213-14. If the picketing was protected by § 7, only a union could have filed an unfair labor practice charge based on Sears' interference with the right to picket. *Id.* at 214. This, the union did not do. 436 U.S. at 187.

[68]436 U.S. at 197 (footnote omitted).

[69]*Id.* at 198.

[70]*Id.* The Court also held that *Garmon's* arguably protected branch did not require preemption. *Belknap, Inc. v. Hale*, however, does not involve any manner of protected activity. This aspect of *Sears* analysis is thus beyond the scope of this Note. Generally, the *Sears* analysis of *Garmon's* arguably protected prong examines a party's reasonable lack of a federal remedy and the amount or risk of interference by the state cause of action with the protected conduct. *See, e.g.*, Brody, *supra* note 46; *Recent Developments, supra* note 46.

Sears' effect upon the doctrine of preemption is not clear. It does not affect cases involving clearly protected or prohibited conduct.[71] It also reaffirms *Garmon's* exceptions to preemption where "the activity regulated [is] a merely peripheral concern of the . . . [NLRA] . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the states of the power to act."[72] *Sears* does, however, add an exception where the controversy presented to the state court differs from that which could be brought before the Board.[73]

One commentator criticized *Sears* as being analytically defective,[74] suggesting that while *Sears* purported to follow *Garmon*, it is really the antithesis of *Garmon's* rationale.[75] He stated that "*Garmon's* reasoning is designed to safeguard NLRB primary jurisdiction. Therefore, *Garmon* implies the need to avoid, as much as possible, any concurrent or overlapping jurisdiction by the Board and state courts. *Sears*, however, tolerates overlapping jurisdiction and even extends it to the protected activity area."[76] That such criticism was justified is apparent from the United States Supreme Court's recent decision in *Belknap, Inc. v. Hale*.[77]

B. Preemption in Belknap, Inc. v. Hale

Petitioner, Belknap, Inc., had recognized Teamsters Local No. 89 as the exclusive bargaining representative for its warehouse and maintenance employees. After reaching an impasse during negotiations for a new labor contract, approximately 400 employees struck over economic issues.[78] The employer then granted, without union approval, a wage increase as a reward to union employees who had continued to work. It also advertised

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[71]The conduct involved in *Sears* was both arguably protected by § 7 and arguably prohibited by § 8. *See supra* notes 63-64 and accompanying text. However, the conduct could not have been clearly protected or prohibited since the controversy had not been before the NLRB, the only body with jurisdiction to adjudicate the status of the parties' conduct. *See supra* note 41.

[72]359 U.S. at 245.

[73]Brody, *supra* note 46, at 225. *See supra* text accompanying note 68.

[74]Brody, *supra* note 46, at 223.

[75]*Id.*

[76]*Id.* Professor Brody appears to have viewed *Sears* as an implied attack upon *Garmon's* foundation, rather than an exception. Professor Cox does not share this view. Instead, he is satisfied with the soundness of *Sears*, but states that the decision "[does] nothing to clarify the principles that govern . . . preemption in labor law." *Recent Developments*, *supra* note 46, at 300.

[77]103 S. Ct. 3172 (1983).

[78]The purpose of an economic strike is to win economic concessions from the employer. This is in contrast to an unfair labor practice strike, the object of which is to protest an employer's violation of the NLRA.

for permanent replacements.[79] Several employees, including the respondents, were hired.[80]

Both the union and the company filed unfair labor practice charges with the NLRB, which later issued complaints against both parties.[81] The NLRB's complaint alleged that the employer's unilateral wage increase violated the NLRA.[82] The employer made assurances of permanent employment to the replacements, both before and after the NLRB's complaints were issued.[83]

Approximately three months later, the Regional Director for the National Labor Relations Board called a meeting with the employer and the union and told them that he would dismiss all charges and complaints in exchange for a settlement agreement.[84] The parties' compromise required the company to recall a minimum of 35 strikers per month, until all strikers had been offered reinstatement.[85] The company eventually laid off the "permanent" replacements to accommodate returning strikers.[86]

The terminated replacements then brought suit in state court against Belknap, alleging misrepresentation and breach of contract.[87] Each

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[79]The relevant portion of the advertisement stated: "PERMANENT EMPLOYEES WANTED . . . OPENINGS AVAILABLE FOR QUALIFIED PERSONS LOOKING FOR EMPLOYMENT TO PERMANENTLY REPLACE STRIKING . . . EMPLOYEES." 103 S. Ct. at 3174-75 n.1.

[80]Each replacement signed the following form: "I, the undersigned, acknowledge and agree that I as of this date have been employed by Belknap, Inc. . . . as a regular full-time permanent replacement to permanently replace ____ in the job classification of ____." 103 S. Ct. at 3175.

[81]In response to the charges filed, the Regional Director for the National Labor Relations Board issued two complaints. The first, against the employer, alleged that Belknap wrongfully granted a wage increase without notice to the union. A second complaint was issued against the union, alleging picket line violence. Brief for the National Labor Relations Board as Amicus Curiae at 2-3, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[82]103 S. Ct. at 3175.

[83]Prior to the NLRB's complaints, Belknap issued a letter to all permanent replacement employees which stated, in part, "you will continue to be permanent replacement employees so long as you conduct yourselves in accordance with [company] policies and practices . . . . [W]e have no intention of getting rid of the permanent replacement employees just in order to provide jobs for [returning] strikers." *Id.* at 3175. After the complaints were issued, the company stated: "We want to make it perfectly clear, once again, that there will be no change in your employment status as a result of the charge by the National Labor Relations Board . . . ." *Id.*

[84]The issue of strikers' reinstatement had been the major stumbling block in settling the strike. The union had insisted upon immediate reinstatement for all strikers, a condition rejected by Belknap. The Regional Director then suggested a compromise calling for gradual reinstatement according to a fixed schedule. Brief for Petitioner at 5, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983) (citing Record at 87).

[85]103 S. Ct. at 3176.

[86]*Id.*

[87]*Id.* The laid-off replacements alleged that the company had represented that the replacements were to be permanent employees, knowing that the representations were false and that the replacements would detrimentally rely upon them. The replacements further

replacement claimed compensatory and punitive damages totalling $500,000. Although Belknap won a summary judgment at the trial court, the Kentucky Court of Appeals reversed the decision.[88] Relying upon the 1966 United States Supreme Court decision, *Linn v. United Plant Guard Workers*,[89] the state court held that the state causes of action were not preempted by the NLRA[90] because they were within the local interest and peripheral concern exceptions to the *Garmon* rule.[91]

The United States Supreme Court affirmed the judgment of the Kentucky Court of Appeals by a 6 to 3 decision. Justice White's majority opinion[92] concluded that the replacements' state causes of action were not preempted by the NLRA. The Court first rejected the argument that either the misrepresentation or breach of contract claim was preempted under the rule of *Machinists*.[93] The majority recognized that the *Machinists* doctrine may operate to preempt a state claim which concerns conduct neither protected by section 7 nor prohibited by section 8 of the NLRA where Congress intended the conduct to remain unregulated and available as an economic weapon.[94] However, in *Belknap*, the Court refused to infer the congressional intent that an employer may exercise an economic weapon made available by the NLRA[95] so as to be insulated from liability for

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alleged that the layoffs were in breach of the employment contracts between Belknap and the non-union replacements. *Id.* In states which continue to adhere to the doctrine of employment-at-will, a state cause of action may be unavailable because individual contracts of employment are terminable at the will of either party. *See, e.g.*, Shaw v. S. S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975). Kentucky, where *Belknap* originated, retains the employment-at-will doctrine. Louisville & Nashville R.R. v. Marshall, 586 S.W.2d 274 (Ky. Ct. App. 1979). The doctrine is, however, subject to contractual modification. *Id.* That the employment contract in Belknap was for a "permanent" term, thus a contractual modification of the common law rule, is the likely explantion for the employees' breach of contract claim being recognized in Kentucky. It is also possible that Belknap impliedly abolishes employment-at-will. This issue is, however, beyond the scope of this Note. For an extended discussion of the doctrine, see Murg & Scharman, *Employment-at-Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. Rev. 329 (1982).

[88]103 S. Ct. at 2176.

[89]383 U.S. 53 (1966). *Linn* involved libelous statements made in the context of a labor dispute. The United States Supreme Court held that a state cause of action for malicious libel was not preempted by the NLRA because such an action was of peripheral concern to the Act and there existed an overriding state interest in protecting citizens from such conduct. Thus, the case fell within the *Garmon* exceptions of local interests and deeply rooted local feeling. *Id.* at 61-62. *See infra* notes 214-16 and accompanying text.

[90]103 S. Ct. at 3176.

[91]*See supra* text accompanying note 72.

[92]Chief Justice Burger and Justices Rehnquist, O'Connor and Stevens joined in Justice White's opinion.

[93]103 S. Ct. at 3177.

[94]*Id.* (citing 427 U.S. 132, 140, 147-48).

[95]The economic weapon involved is the employer's privilege to hire permanent replacements during an economic strike. Under federal law, an employer faced with a strike over economic issues may hire permanent replacements who may be retained in preference

otherwise actionable breaches of contract or misrepresentations.[96]

Belknap argued that the imposition of liability for the firing of permanent replacements would either dissuade employers from hiring permanent replacements at all, or would encourage employers to refuse to settle strikes.[97] Thus, these state claims would necessarily interfere either with an employer's use of an economic weapon or with the federal policy of encouraging the settlement of labor disputes. Justice White rejected this argument, reasoning that Congress did not intend to preempt state law where the use of an economic weapon injures "innocent third parties."[98] The Court rejected the NLRB's position on the issue of state interference with economic weapons and federal policy by finding that the employer could have acted consistently with both federal and state law.[99] The Court's novel suggestion to the employer was to hire the replacements "permanently," subject to an NLRB order to reinstate the strikers or to a negotiated settlement with the union.[100] The Court stated:

> An employment contract . . . promising permanent employment, subject only to settlement . . . and to a Board . . . order . . . would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of . . . a purely economic strike

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to strikers who offer to return to work. The requirement that the replacements be given permanent status provides the "legitimate and substantial business justifications" which are necessary to override strikers' interests in reinstatement. Laidlaw Corp. v. NLRB, 414 F.2d 99, 105 (7th Cir. 1969) (citing NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938)). However, if the strike is in protest of an employer's unfair labor practice, federal law requires that the strikers be reinstated whether or not permanent replacements were hired. 103 S. Ct. at 3174.

[96]103 S. Ct. at 3177-78.

[97]Belknap argued:

> If an employer could be subjected to substantial financial liability for agreeing to recall the strikers as part of a strike settlement agreement, as a practical matter, the employer would have the alternative of either being constrained from hiring permanent replacements altogether, in which case the theoretical right becomes illusory; or the employer could hire permanent replacements and thereafter be constrained to refuse to agree to recall the striking employees even though such agreement might settle a labor strike. The latter situation would inevitably prolong economic strikes and frustrate the collective bargaining process.

Brief for Petitioner at 19, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[98]103 S. Ct. at 3178. The Court stated:

> It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships. We cannot agree . . . that Congress intended such a lawless regime.

Id.

[99]*Id.* at 3179.

[100]*Id.*

> . . . . Those contracts . . . create a sufficient permanent arrangement to permit the prevailing employer to abide by its promises.[101]

The Court also held that neither the contract claim nor the misrepresentation claim was preempted under the *Garmon* rule.[102] The opinion noted that "[u]nder *Garmon*, a state may regulate conduct that is of only peripheral concern to the Act or which is so deeply rooted in local law that courts should not assume that Congress intended to preempt the application of state law."[103] Justice White relied upon three cases to conclude that both state claims fell within the *Garmon* exceptions. *Linn v. United Plant Guard Workers*,[104] also relied upon by the state court in *Belknap*, held that a state cause of action for malicious libel fell within both the peripheral concern and the deeply rooted local interest exceptions.[105] *Farmer v. United Brotherhood of Carpenters*,[106] held that a state claim for intentional infliction of emotional distress also fell within these exceptions.[107] The Court in *Belknap* also relied upon *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*.[108] The *Belknap* opinion viewed *Sears* as requiring that the controversies which could be brought both in the state court and before the NLRB must be identical to preempt the state cause of action.[109] In *Belknap*, the controversies differed because the focus of the state cause of action was on the rights of the replacements while any potential NLRB action would focus upon the rights of the strikers.[110]

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[101] *Id.*

[102] The *Garmon* rule holds that where activity is actually or arguably prohibited by § 8 of the NLRA, the state cause of action is preempted. The majority concluded this to be the case even if the hiring of the replacements was itself an unfair labor practice prohibited by § 8. The hiring could have been so classified if the unilateral wage increase granted by the employer during the strike had converted the strike into an unfair labor practice strike. The unfair labor practice would be interference with the right to strike, a right protected by § 7 of the NLRA. The interference would be the permanent replacement of unfair labor practice strikers, who are entitled to automatic reinstatement at the conclusion of the strike. *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).
375 (1967).

[103] 103 S. Ct. at 3182.

[104] 383 U.S. 53 (1966).

[105] *See supra* note 89 and accompanying text.

[106] 430 U.S. 290 (1977).

[107] *Farmer* involved a union member's state cause of action against his union for intentional infliction of emotional distress. The Court concluded that the claim was not preempted. The Court analogized the claim to those involving violence or malicious libel. *See* Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (involving malicious libel); UAW v. Russell, 356 U.S. 636 (1958) (involving violence). Thus, the cause of action in *Farmer* was found to be within the peripheral concern and local interest exceptions. *See infra* notes 217-24 and accompanying text.

[108] 436 U.S. 180 (1978).

[109] 103 S. Ct. at 3183. *See infra* notes 227-35 and accompanying text.

[110] 103 S. Ct. at 3183. *See infra* notes 147-55, 227-35 and accompanying text.

Thus, neither the contract claim nor the misrepresentation claim was preempted under the *Machinists* doctrine because Congress did not intend the activity to go unregulated. Nor was either claim preempted under *Garmon* because both claims fell within the peripheral concern and deeply rooted local interest exceptions.

Justice Blackmun concurred in the judgment, but was unwilling to join the majority's analysis. His primary criticism of the decision was that the Court had not deferred to the NLRB's interpretation of the Act regarding permanent replacements.[111] His concern was that the Court's standard of conditional permanence[112] would not satisfy the requirement of the substantial and legitimate business justifications which must be met if the employer is to retain replacements in preference to economic strikers.[113] The concurring opinion went on to suggest that an employer who chooses to retain replacements hired under the majority's standard would be open to unfair labor practice charges of threat of reprisal or of discouraging employees' rights to strike.[114]

Although Justice Blackmun recognized that this was a difficult case that did not comfortably fit within existing preemption analysis, he joined the majority's finding of no preemption. He recognized that an employer must show a substantial and legitimate business justification in order to retain replacement employees in preference to returning strikers.[115] Justice Blackmun also recognized that a promise of permanent employment provides this justification.[116] He reasoned that such a promise would not provide the required justification unless the employer was bound to perform by the terms of that promise.[117] Justice Blackmun concluded that because

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[111]103 S. Ct. at 3184 (Blackmun, J., concurring). The NLRB would not have recognized the Court's new standard of permanence and would have held the state claims preempted. *Id.*

[112]Justice Blackmun interpreted the Court's standard as meaning that "the jobs are permanent unless [the employer] later decides they are temporary. Such a promise bears little resemblance to a promise of permanent employment." *Id.* at 3185.

[113]*Id.* In order to retain replacement workers in preference to returning economic strikers, the employer must show a substantial and legitimate business justification for doing so. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967). One example of such a justification is where the replacements have been hired permanently in order for the business to remain in operation. *Id.* at 379.

[114]Justice Blackmun reasoned that the majority's conditional promise of permanent employment would allow an employer to threaten to retain replacement employees in preference to returning strikers even though he has not obligated himself to do so. 103 S. Ct. at 3185 (Blackmun, J., concurring).

[115]*See supra* note 113.

[116]*Id.*

[117]Justice Blackmun stated:

> This power to override the economic strikers' statutory entitlement to reinstatement must be based on the common-sense notion that, in order to continue to operate the business, the employer was required to obligate himself to third parties in a manner inconsistent with the strikers' right to a subsequent reinstatement.

state law is the only method of enforcing a promise of permanent employment, federal law must presume the enforceability of the state cause of action.[118] Thus, the concurring opinion would have held that the state causes of action were not preempted under *Machinists* because Congress did not intend the activity to be unregulated.[119] Justice Blackmun also refused to hold that the replacements' claims were preempted under *Garmon*, because he could find no conduct, either actually or arguably, protected by section 7 or prohibited by section 8 of the NLRA.[120]

Justice Brennan, joined by Justices Marshall and Powell, dissented and would have held that the NLRA preempted both state claims.[121] The dissent viewed the contract claim as preempted under the *Garmon* doctrine. The opinion noted that the strike could have been an unfair labor practice strike from near the beginning, had the parties not settled their dispute and had the NLRB held that Belknap's wage increase was an unfair labor practice.[122] The breaching conduct was, therefore, "arguably required" by federal law.[123] Justice Brennan conceded that arguably required activity was not explicitly covered by the *Garmon* standard,[124] but argued that such conduct is implicitly addressed by *Garmon's* focus upon the NLRB's primary jurisdiction. The dissent stated:

> If there is a need to protect the primary jurisdiction of the Board to avoid conflicting interpretations of federal law, then certainly there is an even greater need to preempt conflicting state regulation of activity that an employer might be required to pursue

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Certainly, avoidance of liability for breach of contract is a legitimate business objective.

103 S. Ct. at 3187-88 (Blackmun, J., concurring).

[118]*Id.* at 3188.

[119]*Id.*

[120]*Id.* at 3189.

[121]*Id.* at 3190 (Brennan, J., dissenting).

[122]The NLRB argued:

> If, during an economic strike, an employer commits what the [NLRB] later determines to be an unfair labor practice and the union continues the strike beyond its natural duration to protest that practice, the strike is converted into an unfair labor practice strike. In such circumstances, the strikers become unfair labor strikers on the date of the conversion.

Brief for the National Labor Relations Board as Amicus Curiae at 11, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983) (citing Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB, 331 F.2d 720, 729 (6th Cir. 1964)). The date of conversion would have been the date beyond which the strike was extended because of the unfair labor practice. 331 F.2d at 728-29.

[123]The dissent viewed the conduct as arguably required because if the strike had been converted into an unfair labor practice strike, dismissing the replacements would have been the only way to obey federal law requiring reinstatement of strikers. 103 S. Ct. at 3192 (Brennan, J., dissenting).

[124]*Garmon* addressed only arguably protected or arguably prohibited conduct. 359 U.S. at 244-45.

> by the Board. The need to preempt conflicting state regulation of arguably required activity follows *a fortiori* from the arguably protected branch of *Garmon*.[125]

The dissent would not have held the misrepresentation claim preempted under the *Garmon* doctrine.[126] Justice Brennan was unable to see the risk of conflicting regulation of employer conduct that he saw with the breach of contract claim, because federal law could not require the misrepresentations.[127] The opinion recognized that, in order for the *Garmon* doctrine to apply, the misrepresentations would have had to have been arguably protected by section 7 of the NLRA or arguably prohibited by section 8.[128] Without elaboration, Justice Brennan stated that the conduct was not arguably protected.[129] Although he believed the conduct to be arguably prohibited by section 8,[130] Justice Brennan was unable to avoid the principle announced in *Sears*,[131] that the state cause of action must be identical to that brought before the NLRB before the state claim can be preempted.[132] *Belknap's* dissent reasoned that a claim brought under the NLRA over the arguably prohibited conduct would differ from the misrepresentation claim brought in state court;[133] therefore, the latter could not be preempted under the *Sears* analysis.

Justice Brennan would have, however, held the misrepresentation claim preempted under the *Machinists* doctrine.[134] The dissenting opinion reasoned that the employer's use of this economic weapon, the right to hire permanent replacement employees during an economic strike,[135] was part of the delicate balance achieved by Congress between the rights of management and labor. The opinion concluded that allowing the state

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[125]103 S. Ct. at 3193 n.2 (Brennan, J., dissenting).

[126]*Id.* at 3195.

[127]Justice Brennan stated:

> There is no sense in which it can be said that federal law required [the employer] to misrepresent to [employees] the terms on which they were hired. Permitting [the employees] to pursue their misrepresentation claim in state court, therefore, does not present the same potential for directly conflicting regulation of employer activity as permitting [them] to pursue their breach of contract claim.

Id.

[128]*Id.*

[129]*Id.*

[130]Justice Brennan stated that "[i]f this strike was converted into an unfair labor practice strike almost immediately after it started, . . . [Belknap's] offers of permanent employment to replacements may have constituted additional unfair labor practices." *Id.* at 3195 n.8.

[131]437 U.S. at 180.

[132]*See supra* notes 108-10 and accompanying text.

[133]103 S. Ct. at 3195-96 n.8 (Brennan, J., dissenting).

[134]*Id.* at 3196. *See supra* notes 51-57 and accompanying text.

[135]The employer's ability to promise permanent status to replacement employees is an economic weapon against the union because it allows the employer to refuse to reinstate strikers at the conclusion of an economic strike. *See supra* note 113.

suit would burden the employer's right to use this weapon, thus upsetting the federal balance.[136]

Finally, the dissenting opinion stressed that *Belknap* did not fall within the exceptions to the preemption doctrines.[137] Justice Brennan stated that the breach of contract claim was not of merely peripheral concern to the NLRA,[138] and impliedly recognized that the same was true of the misrepresentation claim.[139] The dissent was further convinced that the conduct in *Belknap* did not "touch 'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act.' "[140] Justice Brennan distinguished *Belknap* from *Linn*[141] and *Farmer*,[142] cases relied upon by the majority, noting that *Belknap* involved no malicious, outrageous, or violent conduct.[143]

III. *Belknap*: Little Clarification Where Much is Needed

In the five years between *Sears* and *Belknap*, the body of labor law preemption was severely criticized.[144] Referring to *Sears*, one commentator noted that the case "put additional embroidery onto an already complicated legal structure . . . [and] will not encourage coherent development of the preemption doctrine."[145] Another writer "perceive[d] little interest in logical consistency and less interest in building a coherent and continuing body of law."[146] *Belknap* does not make these criticisms obsolete. Rather, the case perpetuates the criticized trends.

This section will first view the importance to *Belknap's* analysis of the existence of third parties to the bargaining agreement. Then the courts refusal to classify the conduct in *Belknap* as either arguably prohibited by section 8 or not prohibited will be discussed. Finally, the Note will analyze *Belknap's* effect upon the *Machinists* and *Garmon* doctrines and upon the *Sears* case.

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[136]103 S. Ct. at 3197 (Brennan, J., dissenting).

[137]*Id.* at 3195 n.7. *See supra* notes 105-07 and accompanying text. *See also infra* notes 214-24 and accompanying text.

[138]103 S. Ct. at 3195 n.7 (Brennan, J., dissenting).

[139]The implication arises from the dissenting opinion stressing that the misrepresentation claim would impinge on the employer's use of an economic weapon, the right to hire permanent replacements. This interference leads to the conclusion that the claim is not of merely peripheral concern to the NLRA. *See supra* note 135 and accompanying text.

[140]103 S. Ct. at 3195 n.7 (Brennan, J., dissenting) (quoting *Garmon*, 359 U.S. at 243).

[141]103 S. Ct. at 3195 n.7 (Brennan, J., dissenting).

[142]*Id.*

[143]*Id. See supra* note 105-07 and accompanying text. *See also infra* notes 214-24 and accompanying text.

[144]*See* Brody, *supra* note 46; *Recent Developments, supra* note 46.

[145]Brody, *supra* note 46, at 223.

[146]Recent Developments, *supra* note 46, at 300.

A. The Significance of Third Parties to the Bargaining Agreement

The *Belknap* controversy was between an employer and non-union employees hired as permanent strike replacements. This is probably the greatest distinction between *Belknap* and all prior labor preemption cases. Indeed, no previous case addressed the problems of preemption as applied to this fact situation.[147] It is unfortunate that the Court in *Belknap* did not discuss more fully the significance of this distinction.

The NLRB argued that the replacement employees were, in fact, members of the bargaining unit and were, therefore, bound by the settlement agreement reached by the employer and the union.[148] The NLRA itself states that a bargaining representative represents all employees in the unit.[149] The United States Supreme Court rejected the argument, relying upon *J. I. Case Co. v. NLRB*.[150] The *Belknap* majority stated that the *Case* opinion "was careful to say that the Board 'has no power to adjudicate the validity or effect of such contracts except as to their effects on matters within its jurisdiction.'"[151] The Court in *Belknap* relied upon this language to assert that *Case* foreclosed the argument that individual employment contracts must yield to collective agreements, presumably because the individual contracts are outside of the NLRB's jurisdiction.[152] Based on this reasoning, Justice White rejected the NLRB's argument that the replacement employees were bound by the settlement

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[147]All prior preemption cases have involved disputes between employers and unions or unions and their members. *See, e.g., Farmer*, 430 U.S. 290 (involving conduct between union and union member); *Garmon*, 359 U.S. 236 (involving conduct between employer and union).

[148]Brief for the National Labor Relations Board as Amicus Curiae at 20, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[149]The Act provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to . . . conditions of employment . . . ." 29 U.S.C. § 159(a) (1976).

[150]321 U.S. 332 (1944). *Case* involved individual employment contracts made between the employer and many employees before a majority of the employees voted in favor of union representation. The company refused to bargain with the union with respect to matters covered by the individual contracts. The Court held:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA] looking to collective bargaining, nor to exclude the contracting employee from . . . [the] bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

Id. at 337.

[151]103 S. Ct. at 3181 (quoting 321 U.S. at 340).

[152]103 S. Ct. at 3181. The Court did not explicitly state the connection between *Case's* language and the assertion of the enforceability of the individual employment contracts. In fact, that same language could be interpreted to justify the opposite conclusion.

agreement between Belknap and the union.[153] *Case*, however, appears not to have rejected the argument, but to have left the issue open where the individual contract contains terms superior to those in the collective agreement. The *Case* opinion stated:

> We cannot except individual contracts generally from the operation of the collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.[154]

In dicta, the Court in *Case* expressed skepticism about the wisdom of injecting individually advantageous contracts into the context of the collective bargain, stating that "[t]he practice and philosophy of collective bargaining looks with suspicion on such individual advantages."[155] It is unfortunate that, with misplaced reliance upon *Case*, the Court dismissed the NLRB's argument in two paragraphs.[156]

Even accepting the Court's rejection of the argument that the replacements were bound by the settlement agreement, uncertainty also exists as to why existing preemption doctrine was applied to the *Belknap* situation. Existing doctrine was designed to determine the preemption of state causes of action involving two parties—employers and union employees. It was not fashioned to handle the triangle that results when non-union replacement employees are added to the dispute.

The Court missed a choice opportunity to enunciate a new doctrine fashioned to accommodate these novel facts. This route, however, would

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[153]If the replacement employees were not bound by the settlement agreement, it could be for one of two reasons. Either the replacements were not part of the bargaining unit and were, therefore, not bound by the collective agreement, or they were not bound even though they were members of the bargaining unit. Justice White was unclear about whether the quoted passage from *Case* supports the former or the latter proposition. The latter interpretation, that members of the bargaining unit are not bound by the agreement, conflicts with § 9(a) of the NLRA, which states that the union "shall be the exclusive [representative] of all the employees in [the] unit for the purposes of . . . bargaining in respect to . . . conditions of employment . . . ." 29 U.S.C. § 159(a) (1976). Thus, the NLRA requires that all members of the unit be bound by the agreement. The former interpretation, however, does not support the proposition that the replacements are excluded from the bargaining unit. There is no logical link between the language of the NLRB's power to pass upon the validity of an individual employment contract and a conclusion that permanent replacements are not to be included in the bargaining unit. Thus, Justice White reached his conclusion through either of two interpretations; one contrary to law, the other contrary to reason.

[154]321 U.S. at 339.

[155]*Id.* at 338.

[156]103 S. Ct. at 3181.

not have afforded the chance to make some major alterations in existing doctrine which the Court apparently desired to make.

B. What Kind of Conduct was Involved?

Before *Belknap*, the threshold issue in preemption analysis was the classification of the conduct involved.[157] This issue is important because under the *Garmon* doctrine a state cause of action can be preempted only where the conduct is actually or arguably protected by section 7 or prohibited by section 8.[158] Conversely, the *Machinists* doctrine supports preemption of state claims only where the conduct is neither protected by section 7 nor prohibited by section 8.[159] Thus, only after the conduct has been identified as actually or arguably protected or prohibited, or clearly not protected or prohibited, does it become apparent which doctrine applies. *Belknap* certainly involved no protected conduct because section 7 only protects employees' conduct.[160] Assuming all conduct falls into one of the above categories, the employer's representations of permanent employment and the dismissal of replacement employees must be more narrowly characterized as actually, arguably, or clearly not prohibited by section 8.

Justice White's majority opinion failed to stress that *Belknap* involved two separate instances of conduct, thus missing the first point of a solid preemption analysis. The misrepresentation claim involved conduct which occurred at the time the replacements were hired, while the breach of contract claim was based upon discharging the replacements.[161] These two instances of conduct do not necessarily lend themselves to analysis under a single heading. This point was addressed by the dissent,[162] the NLRB,[163] and Belknap.[164] It is unfortunate that the Court did not separately stress the classifications of the representations of permanent employment and of the firing of the replacements because it makes *Belknap's* logic difficult to follow. The confusion over the proper classification of each action is further highlighted by the fact that even Belknap and the NLRB,

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[157]*See, e.g.*, Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978).

[158]*See supra* text accompanying note 46.

[159]*See supra* text accompanying note 50.

[160]At issue in *Belknap* was an *employer's* conduct, consisting of promises of permanent employment to replacement employees and the firing of those employees. 103 S. Ct. at 3174-76. Justice Brennan's dissenting opinion viewed the conduct involved in the breach of contract claim as being arguably required, which he argued was implicit within the arguably protected prong of the *Garmon* rule. *Id.* at 3194 (Brennan, J., dissenting).

[161]*See supra* note 87.

[162]103 S. Ct. at 3190 (Brennan, J., dissenting).

[163]Brief for the National Labor Relations Board as Amicus Curiae, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[164]Brief for Petitioner at 16, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

both arguing in favor of preemption, were unable to agree on the issue.[165]

Separate analysis concerning the classification of each instance of conduct is material to the remainder of the Court's analysis, no matter how the conduct is actually classified.[166] The Court must have viewed both causes of action as preempted regardless of how the conduct was classified, given that both the misrepresentation and breach of contract claims were examined under *Garmon* and *Machinists*. If this was the Court's rationale, it is unfortunate because confusion is sure to result over the proper classifications in future cases. The refusal to delineate the classification of each instance of conduct, however, gave the Court an opportunity to examine several facets of both the *Garmon* and *Machinists* doctrines, which were unnecessary to the decision. This enabled the Court to modify two mutually exclusive preemption analyses within a single case.[167]

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[165]*Belknap* asserted that the conduct underlying the misrepresentation claim was arguably prohibited. Brief for Petitioner at 16, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983). The NLRB, however, argued that only the contract claim could come under the arguably prohibited prong. Brief for the National Labor Relations Board as Amicus Curiae at 19, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983). Justice Brennan viewed the firing of the replacements as "arguably required," thus to be analyzed under the arguably protected prong. 103 S. Ct. at 3192-93 (Brennan, J., dissenting).

[166]As a threshold matter, each instance of conduct must be analyzed separately for classification purposes. If both can be classified under the same heading, arguably prohibited for example, then both may be analyzed together under a single preemption doctrine. Because *Garmon* and *Machinists* are mutually exclusive doctrines, there would be no need to discuss both cases in such a situation. If, however, each instance of conduct cannot be classified under the same heading then one must be examined under *Garmon* and the other under *Machinists*. In this situation, it would be unnecessary to analyze both kinds of conduct under both doctrines.

[167]It appears that Justice White's refusal to separately examine preemption of the misrepresentation claim and of the breach of contract claim was an easy way to consider the *Garmon* and *Machinists* doctrines in the same opinion. Once a certain kind of conduct is labeled as either arguably protected or prohibited or clearly not protected or prohibited that conduct is controlled by only one of two preemption doctrines. In *Belknap*, if the conduct underlying either the breach of contract or the misrepresentation claim was arguably prohibited by § 8, the claim can be analyzed only under *Garmon*. Conversely, if either the representations of permanent employment or the firing of the replacement employees was not prohibited by § 8, *Machinists* provides the only applicable doctrine.

The majority in *Belknap* could have reached the same result of no preemption without any discussion of *Garmon* and it exceptions. *See supra* notes 113-19 and accompanying text. Indeed, *Belknap* could have been a straight-forward decision of preemption under the *Machinists* doctrine. Not even *Belknap's* dissent was able to find any arguably prohibited conduct. Justice Brennan was able to apply *Garmon* only by labeling the dismissal of the replacements as "arguably required." 103 S. Ct. at 3192-93 (Brennan, J., dissenting).

Alternatively, if each kind of conduct fell into a separate classification, then each should have been analyzed separately under a single preemption doctrine. This was the approach taken by *Belknap's* dissent, where the breach of contract claim was viewed under the *Garmon* doctrine and the misrepresentation claim under *Machinists*. *Id.* at 3192-96.

C. *The* Machinists *Doctrine: Are Economic Weapons Safe from State Interference?*

The use of economic weapons is a fact of life in labor disputes. The most potent of the weapons held by employees is the right to strike. Under the NLRA, "[n]othing . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . ."[168] For nearly fifty years, the United States Supreme Court has recognized a potent counter-weapon in the hands of an employer, the right to continue operating in the face of a strike by hiring replacements for striking employees.[169] "It does not follow [from the employees' right to strike] that an employer, guilty of no act denounced by [the NLRA], has lost the right to protect and continue his business by supplying places left vacant by strikers."[170] In order to defeat the strikers' right to return to work at the conclusion of an economic strike, the employer's offer to replacements must be for permanent employment.[171]

The doctrine enunciated in *International Association of Machinists v. Wisconsin Employment Relations Commission*[172] was predicated upon the recognition that certain state causes of action may be preempted by federal law even where they do not concern conduct arguably or actually protected by section 7 or prohibited by section 8 of the NLRA.[173] The thrust of the doctrine is that Congress has achieved a delicate balance, between rights available to employees and rights available to management, which is not to be disturbed by state law.[174] Clearly, the United States Supreme Court in *Belknap* did not allow the *Machinists* rule to preempt either state cause of action.[175] What is less clear is precisely why the Court so concluded. There are several possible explanations of *Belknap's* rationale.

One explanation is that the conduct, either the representations of permanent status or the dismissal of the replacements, was arguably prohibited by section 8 of the NLRA and, therefore, controlled by *Garmon*.[176] It is unlikely, however, that this was the Court's primary focus. Although this classification of the employer's actions as arguably prohibited by section 8 would have been an easy way to reach the result of no preemption under the *Machinists* doctrine, this option was not viable. By so classifying,

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[168]29 U.S.C. § 163 (1976).

[169]NLRB v. Mackey Radio & Tel. Co., 304 U.S. 333 (1938).

[170]*Id.* at 345.

[171]*Id.* at 346.

[172]427 U.S. 132 (1976).

[173]*See supra* notes 50-57 and accompanying text.

[174]*See supra* notes 54-57 and accompanying text.

[175]103 S. Ct. at 3177-81.

[176]*See supra* notes 41-49 and accompanying text.

the majority would have been foreclosed from its extended discussion of *Machinists* because any case involving arguably prohibited conduct would be controlled solely by *Garmon*.[177] Further, such a classification may have been impossible. Not even the dissenting opinion was willing to label either instance of conduct arguably prohibited.[178]

Had the Court desired to do so, it could have factually distinguished *Belknap* from *Machinists* because *Machinists* involved a specific state labor statute while *Belknap* involved state tort and contract law.[179] *Machinists*' result was reached only by the concurring votes of Justice Powell and Chief Justice Burger, who joined with the understanding that states were not to be precluded "from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decison . . . ."[180] *Machinists*' concurring opinion defined neutral state laws as those "that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength."[181] *Machinists*' concurring opinion went on to provide almost perfect language for distinguishing *Belknap* by stating that "[e]xcept where Congress has specifically provided otherwise, the states generally should remain free to enforce, for example, their law of torts or of contracts, and other laws reflecting neutral public policy."[182] The *Belknap* majority, however, did not appear to base its decision upon this distinction.[183]

A more likely explanation of *Belknap's* rationale in holding that the state claims were not preempted is that at least some of the Justices of the *Belknap* majority saw this case as an opportunity to narrow the importance of the *Machinists* doctrine.[184] Justice White, author of the Court's *Belknap* opinion, was the only Justice in the majority of both this case and *Machinists*. The *Belknap* opinion, however, seems to return to the philosophy that congressional silence indicates an intent to leave the

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[177]*See supra* notes 157-67 and accompanying text.

[178]Justice Brennan, in analyzing the contract claim under *Garmon*, was forced to argue that the breaching conduct was "arguably required," a classification implicit in *Garmon's* arguably protected prong. 103 S. Ct. at 3192-93 (Brennan, J., dissenting). Belknap contended that the strike had arguably been converted into an unfair labor practice strike and that any representations of permanent status were thus arguably prohibited. Brief for Petitioner at 16-17, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983). The majority, however, did not squarely address the argument. Instead, it proceeded into a discussion of the peripheral concern and local interest exceptions to the *Garmon* rule. 103 S. Ct. at 3182.

[179]*See supra* notes 52, 87 and accompanying text.

[180]427 U.S. at 156.

[181]*Id.*

[182]*Id.*

[183]The Court's opinion did not discuss this language as a distinguishing factor. Further, Justice Powell joined the dissent in *Belknap*. This leads to the inference that he did not believe this to be the basis of the majority opinion.

[184]Two members of the *Belknap* majority had dissented in *Machinists* and seem to have viewed that case as separate and apart from the main body of preemption law. *Recent Developments*, *supra* note 46, at 285-87.

activity under the control of state law.[185] This was the rationale behind the *Briggs-Stratton* case,[186] which *Machinists* explicitly overruled.[187] *Belknap* was not the first time that the continuing validity of *Machinists* was called into question. One commentator perceived a similar attitude following the Court's opinion in the *Sears* case,[188] but believed that the rule had been reaffirmed in a subsequent case.[189]

Apparently the Court desired to significantly narrow *Machinists*. The Court in *Belknap* focused upon what it believed to be the congressional intent that the state claims should not be preempted.[190] Congressional intent was a key factor under the *Machinists* doctrine[191] and was to be found by inquiring "whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the [NLRA's] processes.' "[192] Thus, under the *Machinists* rule, it would

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[185]In *Belknap*, the Court stated:

> It is one thing to hold that the Federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships. We cannot agree . . . that Congress intended such a lawless regime.

103 S. Ct. at 3178. The tone of this language is arguably analogous to that in *Briggs-Stratton*, where the Court noted that "[t]his conduct is governable by the State or it is entirely ungoverned." 336 U.S. 245, 254. In both cases, the Court was unwilling to infer that Congress could possibly have intended that the conduct remain free from state interference.

[186]*See supra* notes 17-23 and accompanying text.

[187]Justices Stevens and Rehnquist would not have overruled *Briggs-Stratton* and thus did not participate in the birth of the *Machinists* doctrine. Consistently, they joined the *Belknap* majority. The third member of the *Machinists* dissent, Justice Stewart, had retired from the Court prior to *Belknap*. Justice O'Connor, his replacement, joined *Belknap's* majority.

[188]Professor Cox observed that "[Justice Stevens, author of the *Sears* opinion,] impliedly rejected *Machinists*, referring to the two aspects of the *Garmon* rule as '*the* general guidelines for deciphering the unexpressed intent of Congress regarding the permissible scope of State regulation of activity touching upon labor-management relations.' " *Recent Developments, supra* note 46, at 285 (quoting 436 U.S. at 187 (emphasis added)). Professor Cox continued: "There is further reason to think . . . *Sears* . . . sought to undermine . . . the *Machinists* decision [in that *Sears*] spontaneously reject[ed] any suggestion that a state may never grant remedies for trespassory picketing because the omission of any federal prohibition implies that the conduct is to be left free of regulation." *Recent Developments*, *supra* note 46, at 286.

[189]New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979). The case involved a constitutional attack upon a state statute which mandated the payment of unemployment benefits to strikers at their employers' expense. The Court, in a 6 to 3 decision with three plurality opinions, "seem[ed] to accept the premise that a state law may be unconstitutional even though the *Garmon* rule [does] not condemn it." *Recent Developments*, *supra* note 46, at 292.

[190]103 S. Ct. at 3178.

[191]*See supra* text accompanying note 54.

[192]427 U.S. at 147-48 (quoting Railroad Trainment v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)).

seem that a state cause of action which burdens the use of a federally sanctioned economic weapon would imply congressional intent that the state suit be preempted by the NLRA. Belknap made such an argument.[193]

The Court in *Belknap*, however, refused to focus upon whether a burden existed and, if so, its effect upon the NLRA's processes. Justice White stated that "'[a]rguments that entertaining suits by innocent third parties for breach of contract or for misrepresentation will 'burden' the employer's right to hire permanent replacements are no more than arguments that 'this is war,' that 'anything goes' . . . . We cannot agree . . . that Congress intended such a lawless regime.'"[194] Accordingly, future analysis under the *Machinists* doctrine may be nothing more than deciding whether Congress intended preemption. If so, *Machinists* will be of little use in protecting the availability of economic weapons against state interference.

The Court in *Belknap* refused to recognize any burden upon the employer's right to hire permanent replacements so as to preempt the state cause of action. Although the Court did not remove the employer's right to use this weapon, this opinion will likely increase the cost of its use. A primary effect of *Belknap* is that there is now only one way for an employer faced with an economic strike to exercise this right and to concurrently remain free from liability should it dismiss the replacements.[195] The employer must now make its offer of permanent employment to replacements conditional upon the NLRB's failure to order the strikers reinstated and upon the absence of a strike settlement agreement to the same effect.[196] Four members of the Court[197] and the NLRB[198] argued

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[193]Belknap argued:

> If an employer could be subjected to substantial financial liability for agreeing to recall the strikers as part of a strike settlement agreement, as a practical matter, the employer would have the alternative of either being constrained from hiring permanent replacements altogether, in which case the theoretical right becomes illusory; or the employer could hire permanent replacements and thereafter be constrained to refuse to agree to recall the striking employees even though such agreement might settle a labor strike. The latter situation would inevitably prolong economic strikes and frustrate the collective bargaining process.
>
> It is precisely this type of state interference with conduct designed [by Congress] to be left unregulated which prompted the preemption rationale enunciated . . . in *Machinists*.

Brief for Petitioner at 19, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[194]103 S. Ct. at 3178.

[195]An employer will be forced to discharge replacements in an unfair labor practice strike, because federal law requires the reinstatement of unfair labor practice strikers. *See supra* note 95.

[196]103 S. Ct. at 3179.

[197]103 S. Ct. at 3186 (Blackmun, J., concurring), 3190 (Brennan, J., dissenting). The dissenting opinion was joined by Justices Marshall and Powell.

[198]Brief for the National Labor Relations Board as Amicus Curiae at 17, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

that a promise of conditionally "permanent" employment would lack the "legitimate and substantial business justification"[199] which is required to enable the employer to retain the replacements in preference to the returning strikers.[200] This, they asserted, could be an unfair labor practice.[201] The employer's only alternative is to promise unconditional permanent employment, as in *Belknap*, and risk being sued by discharged replacements when strikers are reinstated.

After *Belknap*, an employer will be reluctant to settle a labor dispute by agreeing to reinstate strikers. There will be a propensity to litigate unfair labor practice charges to final adjudication in order to either establish the employer's right to retain the replacements, or to receive a Board order to dismiss them. The NLRB noted that in excess of 82 percent of unfair labor practice complaints are settled by the parties.[202] Given that the NLRB issues nearly 8,000 complaints annually,[203] any significant increase in the propensity to litigate will result in added delay and expense to those involved in labor disputes. These additional costs will further dampen parties' willingness to assert their rights under the NLRA.

In sum, the *Belknap* opinion has narrowed the availability of preemption in cases involving activity neither protected by section 7 of the NLRA nor prohibited by section 8. The Court did not stop here, but went on to discuss preemption of state claims involving conduct arguably protected by section 7 or prohibited by section 8. This strand of preemption is controlled by the analysis of *San Diego Building Trades Council v. Garmon*.[204]

D. Belknap's Garmon *Analysis—What About* Sears?

The *Belknap* majority recognized that "state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably prohibited . . . by the [NLRA]."[205] This is the so-called *Garmon* doctrine.[206] After finding that the *Machinists* doctrine did not require preemption, the United States Supreme Court in *Belknap* went on to hold that the replacements' state causes of action were not preempted under *Garmon*.[207] As in its *Machinists* analysis, the Court in

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[199]NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967).

[200]*See supra* note 113.

[201]Justice Blackmun suggested charges of threat of reprisal for engaging in concerted activity and unjustified refusal to reinstate strikers at the conclusion of an economic strike. 103 S. Ct. at 3186 (Blackmun, J., concurring).

[202]Brief for the National Labor Relations Board as Amicus Curiae at 13 n.6, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[203]*Id.*

[204]359 U.S. 236 (1959).

[205]103 S. Ct. at 3177.

[206]*See supra* notes 35-46 and accompanying text.

[207]103 S. Ct. at 3183.

Belknap mentioned several justifications for the result but relied on none specifically.

An easy but unlikely explanation of the result is that neither the employer's representations of permanent employment to replacements nor their firing was conduct arguably prohibited by section 8 of the NLRA. Had the activity been classified as not arguably prohibited, the *Garmon* doctrine would not have applied.[208] However, this interpretation would have foreclosed the opportunity to examine the exceptions to the *Garmon* rule,[209] which the *Belknap* opinion discussed at length.[210]

The more probable interpretation of *Belknap* is that the Court found that the case fell within one of *Garmon's* exceptions. The Court, in *Garmon*, had recognized that the states' power to regulate is not preempted where "the activity regulated was a merely peripheral concern of the . . . Act . . . [or] where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."[211] These exceptions are possible because they do not interfere with *Garmon's* underlying rationale of protecting the NLRB's primary jurisdiction.[212]

Belknap's majority opinion focused upon two cases which had explained the exceptions. *Linn v. United Plant Guard Workers*[213] involved a state libel suit which charged the union with making false and defamatory statements. The union argued for preemption, but the United States Supreme Court allowed the state claim for malicious libel to stand because the cause of action was of only peripheral concern to the NLRA and would not interfere with the NLRB's adjudication of the underlying labor controversy.[214] The Court also recognized an overriding state interest in redressing citizens' injuries from malicious libel.[215]

Farmer v. United Brotherhood of Carpenters[216] involved a union member's suit against his union for intentional infliction of emotional distress resulting in bodily harm and for discrimination with regard to job referrals. The union argued that preemption was required because the employment discrimination was arguably an unfair labor practice under the NLRA. The state cause of action was, however, allowed to stand.[217]

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[208] *See supra* note 173.

[209] *See supra* text accompanying note 46.

[210] 103 S. Ct. at 3182-84.

[211] 359 U.S. at 243-44.

[212] These exceptions also apply to preemption under the *Machinists* doctrine. 427 U.S. 132, 136-37. However, the Court did not rely upon these exceptions in analyzing the *Machinists* side of the *Belknap* case.

[213] 383 U.S. 53 (1966).

[214] *Id.* at 61.

[215] *Id.* at 62.

[216] 430 U.S. 290 (1977).

[217] *Id.* at 302.

The Court in *Belknap* read *Linn* and *Farmer* more broadly than they had been read in the past,[218] by interpreting these cases as exempting from preemption less egregious conduct than malicious or outrageous activity.[219] *Farmer*, a unanimous opinion, had limited *Linn* to situations involving defamatory statements published with knowledge of or reckless disregard for falsity[220] and analogized intentional infliction of emotional distress to prior exception cases involving violence and defamation.[221]

The *Belknap* opinion greatly expanded *Farmer* in a manner not justified by, and arguably contrary to, the Court's opinion in *Farmer*. Justice White asserted that the cause of action in *Farmer* was not preempted "even though a major part of the cause of action consisted of conduct that was arguably an unfair labor practice."[222] However, the *Farmer* opinion stated that "it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself."[223] The *Farmer* opinion further limited itself by requiring a showing of outrageous conduct, noting that the state suit would be intolerable if it could be made on proof of common clashes in labor disputes.[224] *Belknap* relied in part upon *Linn* and *Farmer* to fit the replacements' misrepresentation and breach of contract claims into the local interest and peripheral concern exceptions to the *Garmon* rule.[225] This indicates a substantial broadening of the exceptions to cover not only violence, malicious defamation and outrageous conduct, but also ordinary misrepresentation and breach of contract which are more closely intertwined with the underlying labor dispute.[226]

The Court cited *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*[227] as additional support for the holding that *Belknap* fell within the exceptions to the *Garmon* doctrine. Prior to *Belknap*, the

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[218]*See, e.g., Sears,* 436 U.S. 180, 195-97.

[219]103 S. Ct. at 3182-84.

[220]430 U.S. at 299.

[221]*Id.* at 302. *See, e.g., Linn*, 383 U.S. 53 (involving libel); UAW v. Russell, 356 U.S. 364 (1958) (involving violence).

[222]103 S. Ct. at 3183.

[223]430 U.S. at 305.

[224]*Id.* at 305-06. In *Farmer*, the Court remanded the case due to a fear that the jury may have relied upon the facts showing employment discrimination, the unfair labor practice, in awarding damages for the outrageous tortious conduct. *Id.* at 306.

[225]103 S. Ct. at 3182-84.

[226]Justice Brennan's dissent would have read *Linn* and *Farmer* more strictly, thus distinguishing *Belknap*. 103 S. Ct. at 3195 n.7 (Brennan, J., dissenting). The conduct involved in *Belknap*, the hiring and firing of employees from specific jobs was at the very core of the dispute, as contrasted with libelous statements and violent conduct which arises from, rather than causes, the underlying dispute.

[227]436 U.S. 180 (1978).

impact of *Sears* upon *Garmon* was unclear. The Court in *Sears* endorsed the *Garmon* doctrine in form, but appeared to severely damage the doctrine's philosophical structure.[228] Read broadly, *Sears* could have shaken the foundation of preemption analysis developed in *Garmon*. *Belknap*, however, narrowed *Sears* so that it can be read only as creating another exception to the *Garmon* doctrine.[229] In *Belknap*, the Court's only discussion of *Sears* was in the context of the local interest and peripheral concern exceptions, on the level of cases such as *Farmer* and *Linn*.[230] The Court appeared to cite to Justice Stevens' language in *Sears* as an additional exception. "[A] critical inquiry [in applying the *Garmon* rule] . . . is whether the controversy presented to the state court is identical with that which could be presented to the Board."[231] Where the controversies differ, *Garmon* no longer borders on being irrelevant.[232] Rather, *Garmon's* normal operation is not applicable such that the state cause of action will be allowed to stand. *Belknap* apparently meant to limit *Sears* to its facts out of fear that the latter's sweeping language could crumble the *Garmon* cornerstone of labor law preemption.

There exists, however, an inconsistency regarding the term "controversy," as used in the context of the *Sears* exception. *Sears'* use of the term "controversy" was narrow in that the word was defined in terms of elements of the state and federal causes of action.[233] In *Belknap*, the Court found that the state and federal controversies differed because the state causes of action would focus upon the rights of the replacement employees while an NLRB proceeding would be centered upon strikers' rights.[234] While the Court appeared to follow *Sears'* interpretation of

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[228]*See supra* notes 75-76 and accompanying text.

[229]*See supra* text accompanying notes 108-10.

[230]103 S. Ct. at 3177, 3182-83.

[231]*Id.* at 3183.

[232]*See supra* notes 71-76 and accompanying text.

[233]In *Sears*, the controversy that could have been presented to the NLRB involved the nature of the picketing while the state controversy concerned the picketing's location. The Court in *Sears* stated:

> [T]he federal issue would have been whether the picketing had a recognitional or work reassignment objective; [the] decision of that issue would have [been] . . . completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim.

436 U.S. at 198 (footnote omitted).

[234]Justice White stated:

> It is true that whether the strike was an unfair labor practice strike and whether the offer to replacements was the kind of offer forbidden during such a dispute were matters for the Board. The focus of these determinations, however, would be on whether the rights of strikers were being infringed. Neither controversy would have anything in common with the question whether Belknap made

"controversy," it allowed the replacements to recover *damages* for breach of an employment contract, but would not permit the state to grant specific performance of such a contract or injunctive relief if such a remedy would require the dismissal of a striker entitled to reinstatement under federal law.[235] This is inconsistent because, in such a situation, nothing has changed the controversy. Rather, only the remedy differs.[236]

If a broader and more general interpretation of "controversy" is used, it is arguable that the state and federal controversies in *Belknap* would be found to be identical under the *Sears* exception. Strikers claimed the right to return to their former jobs under federal law, while replacements claimed the right to occupy those same jobs under state law. The Court apparently concluded that different parties created different controversies. However, both controversies involved precisely the same conduct and the same jobs. The need for additional judicial gloss upon the *Sears* exception to *Garmon* is clear. Without proper refinement, this new exception could completely engulf the rule.

Superficially, the *Belknap* majority reaffirmed the vitality of the *Garmon* doctrine. Realistically, however, the doctrine is now better defined by its exceptions. *Belknap* has widened the scope of the local interest and peripheral concern exceptions to include ordinary tort or breach of contract suits in state court. *Belknap's* interpretation of *Sears* further narrowed the *Garmon* doctrine by expanding *Sears'* "different controversies" exception to include different *remedies*. After *Belknap*, as long as the state remedy is different from the NLRB remedy, a state cause of action will not be preempted under *Garmon*.

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misrepresentations to replacements that were actionable under state law. The Board would be concerned with the impact on strikers not with whether the employer deceived replacements.

103 S. Ct. at 3183.

[235] *Id.* at 3183 n.13. *See supra* note 95.

[236] It is not an answer to say that the state award of damages is of no threat to NLRB jurisdiction because that agency is powerless to award damages. *Garmon* stated that it was not "significant that [the state] asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate . . . . Such regulation can be as effectively asserted through an award of damages as through some form of preventive relief." 359 U.S. at 246-47.

Also, this interpretation of "controversy" leads to the conclusion that *Garmon* now can only operate to preempt a state cause of action brought under a state labor relations statute containing language similar to that of the NLRA. A state suit brought under any other laws would not be identical to a controversy brought under the NLRA. This result is contradictory to language in *Garmon*, where the Court stated that it did not matter "whether the states have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the states to control conduct which is the subject of national regulations would create a potential frustration of national purposes." *Id.* at 244.

IV. Conclusion

Belknap does little to clarify ambiguities that have arisen in recent labor law preemption cases. Instead, *Belknap's* "deeply rooted, different remedy, Congress could not have intended" test further clouds preemption law. One clear implication is that states now control a larger portion of the body of labor law than they did before *Belknap*. It is also clear that the Court desired to use *Belknap* to address a broad range of issues in the area. The *Machinists* doctrine is now narrower, as is the *Garmon* rule through the expansion of its exceptions. In its haste to limit the area of exclusive federal domain in favor of more state control over labor law, the court has raised new uncertainties regarding the practical value of an employer's right to exercise his most powerful economic weapon, the right to hire permanent replacements, which must make labor's weapons less secure by analogy. Although the result in *Belknap* may have been desirable, because the state remedy was probably the only one available to the replacements, it is unfortunate that the Court chose such a complex route to that end. If nothing else, the case shows further need for a coherent preemption doctrine.

James P. Cavanaugh III

Res Judicata in the Federal Courts: Federal or State Law?

I. Introduction

The effect of res judicata[1] in a federal court with diversity of citizenship jurisdiction is a complex and unresolved issue. The debate centers around whether state or federal laws of res judicata should control. The *Erie*[2] doctrine requires federal courts exercising diversity jurisdiction to follow state law in substantive matters and federal law for merely procedural matters. Federal courts differ, however, as to whether res judicata is a substantive or procedural issue.[3] Some federal courts hold that state rules of res judicata create substantive rights so that the applicable state law controls.[4] Others take the view that federal law of res judicata should be used, either under the rationale that res judicata is merely a procedural device,[5] or that countervailing federal policies justify the use of federal res judicata law in diversity actions.[6]

While state and federal law of res judicata may be the same in some instances,[7] the question remains as to which law controls when they differ.

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[1]For a general discussion of res judicata, see C. Wright, The Law of Federal Courts § 100A (4th ed. 1983). As Professor Wright notes, res judicata is initially divided into two broad categories, "claim preclusion" and "issue preclusion." *Id.* at 680. Unlike claim preclusion, there may be valid reason to utilize federal rules for issue preclusion in diversity suits. *See infra* notes 162-63 and accompanying text. *See also* Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 Cornell L. Rev. 96, 106-07 (1965) (discussing the application of collateral estoppel in federal courts). The consideration of issue preclusion, however, is beyond the scope of this Note. The term "res judicata" for the purposes of this Note is limited to claim preclusion.

[2]Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[3]*Compare* Gasbarra v. Park-Ohio Indus., 655 F.2d 119 (7th Cir. 1981); Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978); Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948) (all holding state law controls) *with* Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum); Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) (all holding federal law controls). *See also* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 769 (1976) (supporting the view that federal law should control); 1A J. Moore & B. Ward, Moore's Federal Practice ¶ 0.311[2], at 3182 (2d ed. 1983) (stating that state rules of claim preclusion and federal rules of issue preclusion should control).

[4]*See* Gasbarra v. Park-Ohio Indus., 655 F.2d 119 (7th Cir. 1981); Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978); Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948).

[5]*See* Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum).

[6]*See* Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962); *see also* Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum).

[7]*See, e.g.*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 539-40 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (same result whether state or federal rules of collateral estoppel applied); Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 713 n.3 (2d Cir. 1977) (effect of prior dismissal was on the merits under state or federal

For instance, in some states a trial court judgment that has been appealed is not res judicata until the appeal process is complete. In federal courts a trial judgment is res judicata when rendered although the judgment is appealed.[8] In addition, a dismissal for lack of prosecution may not bar a subsequent suit in state courts, yet such a dismissal may bar a second suit in federal courts if it is not labeled "without prejudice."[9] Likewise, a dismissal of a suit because the statute of limitations has expired may not bar a second action in state courts, while a federal court could treat it as a bar.[10] As these examples illustrate, the individual states and federal court system often utilize the doctrine of res judicata in a different manner. Consequently, a plaintiff faced with a res judicata question is likely to choose the forum most favorable to him.

The conflict between applying state or federal res judicata law involves more than differing views as to whether it affects substantive or procedural rights. The debate goes to whether the federal courts perceive their roles as merely another tribunal of the state,[11] or as a strictly federal forum.[12] The courts are also affected by their view of the importance of federal policies of efficiency and reliability,[13] and the *Erie* requirements of uniformity and non-discrimination.[14] Additionally, the policies behind res judicata—avoiding harassing litigation, preventing overcrowded court dockets, and ensuring certainty and respect for court decisions—are important in resolving the question. This Note will examine the conflicting approaches to res judicata issues in diversity actions, and will suggest that the use of state law would best fulfill the goals of diversity jurisdiction and the *Erie* doctrine.

II. The Impact of the *Erie* Doctrine on Choice of Law

In diversity of citizenship actions,[15] there has been a historical controversy over which law the court must use, state or federal. Although

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law); Gerrard v. Larson, 517 F.2d 1127, 1131-32 (8th Cir. 1975) (state and federal rules of mutuality for defensive collateral estoppel the same).

[8]*See* Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983).

[9]*See* Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) (dismissal under Federal Rule 41(b) is with prejudice unless specifically stated otherwise).

[10]*See* Hartmann v. Time, 166 F.2d 127 (3d Cir. 1948) (a dismissal on the grounds that the statute of limitations has run is not on the merits so that it is not res judicata).

[11]*See, e.g.*, Hartmann v. Time, Inc., 166 F.2d 127, 138 (3d Cir. 1948) (stating that a district court is a court of the state in which it sits insofar as diversity cases are concerned).

[12]*See, e.g.*, Aerojet-General Corp. v. Askew, 511 F.2d 710, 716 (5th Cir. 1975) (stating that the federal court system is independent of state courts in diversity suits).

[13]*See, e.g.*, *id.* (stating that the importance of preserving the integrity of the federal court judgment cannot be overemphasized).

[14]Erie R.R. v. Tompkins, 304 U.S. 64, 74-75 (1938).

[15]28 U.S.C. § 1332 (1982). This statute provides in part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of in-

the Rules of Decision Act [16] provided that "the laws of the several states . . . shall be regarded as the rules of decision" in diversity actions, for many years federal courts did not consider state court decisions to be "laws."[17] The United States Supreme Court upheld this approach in *Swift v. Tyson*.[18] In the *Swift* case, the Court found that federal courts exercising diversity jurisdiction could apply federal common law,[19] unless the state law was based on the state's written constitution or statutes, or the claim was a purely local matter, such as a real estate dispute.[20]

In *Erie Railroad v. Tompkins*,[21] the Supreme Court overruled its decision in *Swift* and held that in diversity actions, federal courts are bound by the substantive law of the states in which they sit.[22] In delivering the Court's opinion, Justice Brandeis gave three reasons for abandoning the *Swift* doctrine. First, he stated that Congress did not have the constitutional power[23] to declare the substantive rules of common law applicable in a state.[24] Second, he recognized that diversity of citizenship jurisdiction

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terest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Id. The necessity of retaining diversity jurisdiction has been the subject of heated debate for over sixty years. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601 (1981) [hereinafter cited as WRIGHT & MILLER]. If diversity jurisdiction were eliminated from the federal courts, the issue of whether state or federal rules of res judicata should apply in diversity suits would, of course, become moot.

[16]Rules of Decision Act, ch. 646, 62 Stat. 944 (1948) (codified as amended at 28 U.S.C. § 1652 (1982)). The Rules of Decision Act provides: "The laws of several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

[17]C. WRIGHT, *supra* note 1, § 54, at 348.

[18]41 U.S. (16 Pet.) 1 (1842).

[19]*Id.* at 18.

[20]*Id.* at 18-19.

[21]304 U.S. 64 (1938).

[22]*Id.* at 78.

[23]The Court stated that the aim of the Rules of Decision Act "was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written." *Id.* at 72-73 (footnote omitted). The *Swift* doctrine, however, held that federal courts were only bound by written laws and constitutions of the State, except in purely local matters. 41 U.S. (16 Pet.) at 18-19. *See supra* note 20 and accompanying text.

[24]304 U.S. at 79. Brandeis concluded:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law

"was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State."[25] The *Swift* doctrine, however, had produced the opposite effect. Because federal courts in diversity actions applied federal common law under the *Swift* doctrine, it made "rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court . . . ."[26] Finally, Justice Brandeis noted that the application of federal common law resulted in "forum shopping"[27] by out-of-state litigants between state and federal courts.[28] Justice Brandeis reasoned that the ability of the non-citizen to forum shop between state and federal diversity-based courts, and the resulting discrimination exercised against local citizens, "rendered impossible equal protection of the law."[29] Consequently, the Court ruled that federal courts exercising diversity jurisdiction must follow the substantive laws of the state in which they sit. In procedural matters, however, federal law would control.[30]

The *Erie* decision created some new issues in determining which law the federal courts must apply in diversity suits. The courts became concerned with how the Federal Rules of Civil Procedure,[31] adopted shortly after the *Erie* decision,[32] related to the substance/procedure issue. Additionally, questions arose as to how the full faith and credit requirements[33] affected their choice of res judicata law in diversity suits.[34] Finally, courts disagreed on whether particular state rules were substantive or procedural,[35]

> applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.

Id. at 78. The Court then ruled that the *Swift* doctrine of applying federal general common law in diversity cases was unconstitutional. *Id.* at 79.

[25] *Id.* at 74. The second and third reasons given by Justice Brandeis for overruling *Swift* were policy reasons.

[26] *Id.* at 74-75.

[27] *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (overruled by *Erie*). In *Black & White*, the plaintiff and defendant were both citizens of the state of Kentucky. The plaintiff, in order to avoid a Kentucky state law concerning monopolies, reincorporated in the state of Tennessee. Thus, the plaintiff could invoke diversity jurisdiction in Kentucky and receive the benefit of federal common law which was favorable to its case. Because the plaintiff could forum shop between state and federal court, he could avoid the unfavorable Kentucky state law. *Id.* at 532 (Holmes, J., dissenting).

[28] 304 U.S. at 75. The Court stated that "the privilege of selecting the court in which the [litigants'] rights should be determined was conferred upon the non-citizen." *Id.* (footnote omitted).

[29] *Id.*

[30] *Id.* at 78.

[31] See *infra* notes 45-52 and accompanying text.

[32] See *infra* note 46 and accompanying text.

[33] U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1970). *See infra* notes 53-54.

[34] *See infra* notes 53-66 and accompanying text.

[35] *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) (noting that the substance/procedure distinction is ambiguous).

a debate that continues today.[36] The impact of the Federal Rules, full faith and credit, and the substance/procedure distinction affect the choice of res judicata law in diversity actions and a thorough understanding of each is crucial.

A. The Substance/Procedure Problem of Erie

The United States Supreme Court recognized the problem of procedural versus substantive law in the case of *Guaranty Trust Co. v. York*,[37] where the issue was whether the state or federal statute of limitations should apply in a diversity action when the two are at odds.[38] The Court offered a substitute to the vague substantive/procedural distinction of the *Erie* case, replacing it with the policy that the outcome of the litigation should be the same in federal court as it would be if tried in a state court.[39] The Court reasoned that because the federal court is adjudicating a state created right solely because of diversity of citizenship, it is acting as another tribunal of the state.[40] Concluding that the state law for statute of limitations should control, the Court held:

> [A] statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.[41]

Thus, the fact that the statute of limitations appeared to be a procedural rule was not sufficient to allow the federal court exercising diversity jurisdiction to ignore the state practice.[42]

Other apparently procedural practices of the state courts have been found to create substantive rights so as to control over conflicting federal practices. The Supreme Court has held that a federal court sitting in a diversity action must follow the conflict-of-laws rules of the state in which it sits.[43] Likewise the Court has held that the allocation of the burden

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[36]*Cf.* Hanna v. Plumer, 380 U.S. 460 (1965) (noting that the line between substance and procedure shifts as the legal context changes).

[37]326 U.S. 99 (1945).

[38]*Id.* at 100-01.

[39]*Id.* at 109. *But see* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (stating that every procedural variation is "outcome determinative" so that state law would always control under this analysis). *See infra* note 144.

[40]326 U.S. at 108-09.

[41]*Id.* at 110.

[42]*Id.*

[43]Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487 (1941). *See also* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975). In *Day*, the plaintiff sued the defendant in federal court in Texas based on diversity jurisdiction. The plaintiff claimed that the defendant was liable for the premature explosion of ammunition which had been manufactured

of proof relates to the substantive rights of the parties, and that the state rules should take precedence over conflicting federal practices.[44] As these examples illustrate, state rules that appear to be procedural may nevertheless be found to control in diversity actions because the state rules create vital rights, and a different outcome would result under federal law.

B. The Erie *Doctrine and The Federal Rules of Civil Procedure*

The same year the *Erie* decision was handed down, another major development occurred in the federal court system when the Supreme Court introduced the Federal Rules of Civil Procedure.[45] The Court was given the power to create rules for the federal court system by the Rules Enabling Act.[46] The Act, however, limited the power in that "[s]uch rules shall not abridge, enlarge or modify any substantive right . . . ."[47] The conflict between the procedural control of the Federal Rules and the *Erie* requirement of applying state law in diversity suits was settled by the Supreme Court in *Hanna v. Plumer*.[48]

In *Hanna*, a federal court in a diversity action faced a situation where the Federal Rule and the state rule were in direct conflict on the requirements for service of process.[49] The Court held that the Federal Rule

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by the defendant. The injury occurred in Cambodia. The district court ignored Texas conflict-of-laws rules, which would require the application of the law of the place of injury, Cambodia, and applied federal rules. The Court of Appeals for the Fifth Circuit affirmed, stating that "it was 'a Court of the United States, an instrumentality created to effectuate the laws and policies of the United States.' " *Id.* at 4. The Supreme Court reversed, holding that the district court was required to apply state conflict-of-laws rules in diversity actions. *Id.* at 4-5. The Court stated:

> [T]he conflict-of-laws rules to be applied by a federal court in Texas must conform to those prevailing in the Texas state courts. A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.

Id. at 4.

[44]Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939).

[45]The scope of the Federal Rules "govern[s] the procedure in the United States district courts in all suits of a civil nature." FED. R. CIV. P. 1. This Note will use "Federal Rule" to mean a Federal Rule of Civil Procedure or other rule promulgated pursuant to the Rules Enabling Act for use in all federal district courts, and "federal rule" to mean a rule followed in one or more federal courts but not promulgated under the Enabling Act.

[46]Rules Enabling Act, ch. 651, §§ 1, 2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1982)). In the Act, Congress vested in the Supreme Court "the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and court of appeals of the United States in civil actions . . . and appeals therein." *Id.*

[47]*Id.*

[48]380 U.S. 460 (1965).

[49]*Id.* at 461-62. In *Hanna*, the federal court was located in the State of Massachusetts, and under Massachusetts statutory law, service of process required in-hand delivery. Federal Rule 4(d)(1), however, allowed service by leaving copies at the dwelling place or with

controlled, stating, "The *Erie* rule has never been invoked to void a Federal Rule."[50] The Court held:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[51]

The *Hanna* decision supplied the answer in no uncertain terms as to the relationship of the Federal Rules of Civil Procedure to the *Erie* doctrine in diversity cases. The Federal Rules are procedural in nature, and regardless of the existence of a conflicting state law, the Federal Rules control.[52] If a Federal Rule addresses a given issue, then that rule must be used by the federal court when jurisdiction is based on diversity of citizenship.

C. The Effect of Full Faith and Credit on Res Judicata

The doctrine of full faith and credit also affects res judicata issues, but it is not determinative on the question of whether state or federal law controls in diversity cases. The full faith and credit clause of the Constitution,[53] and the statutory full faith and credit clause as implemented by the Judicial Code of the United States,[54] require courts to give the same effect to a valid judgment that the court which rendered it would.

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persons residing therein. The plaintiff in *Hanna* served copies of the summons and complaint with the defendant's wife at the defendant's home, which would satisfy the Federal Rule, but not the Massachusetts law. *Id.*

[50] *Id.* at 470.

[51] *Id.* at 471 (footnote omitted).

[52] *Id. See generally* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974). As Professor Ely notes:

> [W]here there is no relevant Federal Rule of Civil Procedure or other Rule promulgated pursuant to the Enabling Act and the federal rule in issue is therefore wholly judge-made, whether state or federal law should be applied is controlled by . . . *Erie* . . . . Where the matter in issue is covered by a Federal Rule, however, the Enabling Act . . . constitutes the relevant standard.

Id. at 698.

[53] U.S. CONST. art. IV, § 1. This section states, "Full Faith and Credit shall be given in each State to public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

[54] 28 U.S.C. § 1738 (1982). This section states in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Thus, full faith and credit requires a second court to follow the res judicata laws that the first court which rendered the judgment would apply. For example, suppose a federal court exercising diversity jurisdiction enters a judgment on the merits either for the plaintiff or defendant. Then a second action is brought in another court, either state or federal, involving the same issues and between the same parties. If the victorious party in the first suit asserts a defense of res judicata in the second action, full faith and credit would require the second court to determine what effect the first court would have given to the judgment. In other words, the second court must look not to its own res judicata laws, but to those of the court which rendered the judgment.

The problem remains, however, in deciding which law a federal court exercising diversity jurisdiction would use to determine the scope of its own judgment. This dilemma was addressed by the United States Court of Appeals for the District of Columbia Circuit in *Semler v. Psychiatric Institute of Washington, D.C.*[55] After obtaining a judgment for a wrongful death action in a federal court in Virginia exercising diversity jurisdiction, the plaintiff initiated a second suit against the same defendants based on diversity jurisdiction in the District Court for the District of Columbia.[56] The plaintiff sought relief under two District of Columbia statutes, the Wrongful Death Act and the Survival Act.[57] The district court granted a summary judgment for the defendants on the ground that the Virginia judgment was res judicata.[58] The court of appeals affirmed. After a brief reference to the *Erie* doctrine, the court stated:

> [T]he mandate of the Full Faith and Credit Clause as supplemented by 28 U.S.C. § 1738 require [sic] a federal court exercising diversity jurisdiction in forum II to give the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I *at least* in the absence of an overriding federal interest.[59]

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[55]575 F.2d 922 (D.C. Cir. 1978). *See also* Recent Decisions, *Civil Procedure—State Law of Res Judicata Applied in Federal Court Exercising Diversity Jurisdiction*, Semler v. Psychiatric Institute of Washington, D.C., 9 CUM. L. REV. 569 (1978).

[56]575 F.2d at 923-24.

[57]*Id.* at 924. The District of Columbia allows two independent causes of action for negligently causing a death. The Wrongful Death Act creates a right of action in favor of designated beneficiaries. Recovery is based on the pecuniary benefits the beneficiaries would have gained had the decedent lived. *Id.* at 924-25. The Survival Act is designed to place the decedent's estate in the position it would have been in had the decedent lived. Recovery is based on the future earnings the decedent would have made had he lived less the amount he would have spent in order to maintain himself and his beneficiaries under the Wrongful Death Act. *Id.* at 925.

[58]*Id.* at 933.

[59]*Id.* at 927-28.

Thus, the appellate court in *Semler* recognized that full faith and credit required it to follow the "law or usage" of the court which rendered the first judgment.[60] In addressing the issue of whether the Virginia federal court would choose state or federal law or usage, the court cited the United States Supreme Court decision of *Magnolia Petroleum Co. v. Hunt*[61] as dispositive on this issue.[62] In *Magnolia*, the Supreme Court held that a district court had to accord full faith and credit to a prior state court judgment.[63] Recognizing that the *Magnolia* decision involved a prior judgment of a state court and not a federal court exercising diversity jurisdiction, the District of Columbia Circuit nevertheless found that the *Magnolia* decision controlled and that state law should control in diversity actions.[64] Because Virginia law would bar a second action, the circuit court held that the plaintiff's claim was res judicata.[65]

While the District Court for the District of Columbia regarded the "law or usage" of the diversity court to be state law, the question is not yet settled. One commentator has reasoned that the "law or usage" of a federal court is federal law, so that the res judicata law of a federal

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[60] *Id.*

[61] 320 U.S. 430 (1943).

[62] 575 F.2d at 928.

[63] 320 U.S. at 445-46.

[64] 575 F.2d at 930. The *Semler* court also cited the Restatement (Second) of Conflict of Laws. *Id.* The Restatement provides:

> § 93 Recognition of Sister State and Federal Court Judgments
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> A valid judgment rendered in one State of the United States must be recognized in a sister State, except as stated in §§ 103-121.
>
> § 94 Persons Affected
>
> What persons are bound by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered.
>
> § 95 Issues Affected
>
> What issues are determined by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 (1971). Because the Restatement (Second) explicitly addresses the issue in terms of state recognition of a valid state judgment rendered in other states, and does not mention federal judgments, it offers no help in determining whether state or federal laws of res judicata apply in diversity actions. One solution offered by Professor Ronan Degnan, a proponent of using federal laws of res judicata, is a new restatement of the law which would read:

> A valid judgment in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.

Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 773 (1976). The current version of the Restatement, however, does not allow for its application in diversity actions because the Restatement is limited to state, and not federal, judgments.

[65] 575 F.2d at 931.

diversity court would be federal law.[66] This analysis, however, ignores the fact that federal courts exercising diversity jurisdiction must use state substantive law under the *Erie* doctrine. The assumption that the law or usage in federal diversity suits will always be federal law is incorrect.

The use of full faith and credit to solve the problem of whether state or federal rules of res judicata control in a diversity action is easily manipulated to resolve the issue either way. Full faith and credit must be given to the first judgment in a federal court exercising diversity jurisdiction. The second court, however, should not simply conclude that the first federal court's judgment is entitled to full faith and credit for res judicata purposes. The second court must take the next logical step to determine what "law or usage" the first federal court would apply, state or federal rules of bar and merger. Thus, full faith and credit, although applicable to the issue of res judicata as bar or merger, does not determine whether federal or state law applies in diversity actions.

III. Federal Courts Differ in Applying Res Judicata Laws in Diversity Suits

The issue of what res judicata law controls when the first action was based on federal question jurisdiction[67] was decided by the United States Supreme Court in *Heiser v. Woodruff*.[68] The Court stated that in such cases, "the federal courts will apply their own rule of res judicata."[69] The Court specifically declined to decide whether the rule applicable to federal question cases is also applicable to diversity cases, stating:

> We need not consider whether, apart from the requirements of the full faith and credit clause of the Constitution, the rule of *res judicata* applied in the federal courts, in diversity of citizenship cases, under the doctrine of *Erie* . . . can be other than that of the State in which the federal court sits.[70]

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[66]Comment, *supra* note 1, at 100. The writer states:

> The "full faith and credit clause" as implemented by the judicial code refers to the "law or usage" of the judgment court. Any issues as to the extent or effect of the judgment for res judicata purposes must be gleaned from that "law or usage". Without reference to the judgment the requirements of full faith and credit are not met. If full faith and credit is the determinative issue then resort to the state's rules of res judicata is not required.

Id.

[67]28 U.S.C. § 1331 (1976). This statute provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

[68]327 U.S. 726 (1946).

[69]*Id.* at 733 (action under federal bankruptcy law).

[70]*Id.* at 731-32 (citations omitted).

In failing to decide the issue, the Court has left this question open for debate.[71] The federal courts which have decided the issue are split as to whether the rules of claim preclusion of the state or federal system apply in diversity cases.[72] The Third, Seventh, and Eighth Circuits have applied

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[71]The Supreme Court has touched upon the issue of res judicata in diversity suits in other decisions. In a later decision concerning mutuality requirements for collateral estoppel, the Supreme Court stated, "Many federal courts, exercising both federal question and diversity jurisdiction, are in accord [on mutuality requirements] unless in a diversity case bound to apply a conflicting state rule requiring mutuality." Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 325 (1971). One commentator has noted:

> Following this statement in *Blonder Tongue's* text is a string of citations to cases . . . which seem to bear out the principle that federal courts in diversity cases may be required to conform to state law on the scope or effect of a judgment. Neverthless, this statement in the opinion is certainly not a holding (*Blonder-Tongue* itself arose entirely under federal question jurisdiction . . .) and should not even be regarded as dictum. It is merely a factual observation most federal courts have said that in diversity cases they are bound to apply the law of judgments of the state in which they sit.

Degnan, *supra* note 64, at 751.

[72]The Supreme Court has decided some of the issues concerning the effect of a prior state court judgment in a subsequent suit in federal court. *See* Allen v. McCurry, 449 U.S. 90 (1980); Migra v. Warren City School Dist., 104 S. Ct. 892 (1984). In *Allen*, the respondent had been convicted in a state court criminal proceeding. The respondent subsequently brought a § 1983 suit in federal court against certain police officers alleging a conspiracy to violate the respondent's fourth amendment rights. 449 U.S. at 92. The district court held the federal suit barred by collateral estoppel (issue preclusion) because the issue of a fourth amendment violation has been resolved against the respondent by the denial of his suppression motion in the state court criminal proceeding. *Id.* at 93. The Supreme Court upheld the district court, stating:

> Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so . . . .

Id. at 96. *Allen*, therefore, established that issues actually litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the state where the judgment was rendered. The Court in *Allen* left open the possibility, however, that the preclusive effect of a state court judgment might be different as to a federal issue that a § 1983 litigant could have raised but did not raise in the earlier state court proceeding. The Supreme Court answered this question in *Migra*. The petition in *Migra* brought suit in state court for breach of contract against the Board of Education and was awarded reinstatement. 104 S. Ct. at 895. Petitioner then filed suit in federal court under a § 1983 claim, and the district court granted summary judgment for the defendants on the basis of res judicata. *Id.* The Supreme Court upheld the district court, holding that the state court judgment should preclude her suit in federal court even though the petitioner did not litigate her § 1983 claim in state court, but could have. *Id.* at 897. The Court ruled that the petitioner's state court judgment in the litigation had the same claim preclusive effect in federal court that the judgment would have in the state courts. *Id.* at 898.

the *Erie* doctrine and have held that state law of res judicata controls.[73] The Second, Fifth, and District of Columbia Circuits have held that under the Supreme Court decision of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[74] federal rules of res judicata should control in diversity suits.[75]

A. Federal Courts Applying State Res Judicata Law

An examination of the decisions of courts which have held that state law of bar and merger controls in federal diversity actions shows that several of these courts reached their conclusions without much analysis.[76] In *Gatzemeyer v. Vogel*,[77] for example, the res judicata issue arose when the plaintiff had previously sued the defendant in a federal diversity action for specific performance or damages for breach of contract. The court had found in the defendant's favor.[78] The plaintiff then brought a suit based on fraud and deceit in the same transaction against the same defendant and in the same federal district court.[79] The district court ruled that the plaintiff's second suit was barred by the first action.[80] The Eighth Circuit Court of Appeals affirmed, stating: "In considering the issue of claim preclusion the district court was of the view that the law of Iowa governed and plaintiffs do not quarrel with that proposition."[81] The court did not consider whether application of federal law of res judicata could be applied in diversity actions.

The United States Court of Appeals for the Seventh Circuit did not devote much more analysis to the issue in *Gasbarra v. Park-Ohio Industries, Inc.*[82] The plaintiff in that case had received a judgment in federal court exercising diversity jurisdiction in Illinois for improper and ineffective termination of employment, and had received damages for the amount of salary accrued.[83] In a second diversity-based action, the plaintiff sued for non-contractual benefits arising out of employment against the same employer.[84] The district court ruled that the plaintiff's cause

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[73]Gasbarra v. Park-Ohio Indus., 655 F.2d 119 (7th Cir. 1981); Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978); Hartmann v. Time, 166 F.2d 127 (3d Cir. 1948).

[74]356 U.S. 525 (1958).

[75]Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum); Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962).

[76]*See* Gasbarra v. Park-Ohio Indus., 655 F.2d 119 (7th Cir. 1981); Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978).

[77]589 F.2d 360 (8th Cir. 1978).

[78]*Id.* at 361.

[79]*Id.* at 362.

[80]*Id.* at 361.

[81]*Id.* at 362.

[82]655 F.2d 119 (7th Cir. 1981).

[83]*Id.* at 120-21.

[84]*Id.* at 121.

was merged into the first judgment so that claim preclusion operated in the second suit.[85] The Seventh Circuit affirmed.[86] In deciding whether state or federal law of merger applied, the court cited the *Erie* doctrine and stated, "As the trial court properly noted, we are bound in a diversity case by the law of Illinois as expressed by its highest court."[87] The court did not consider whether res judicata is substantive and therefore controlled by state law, or whether federal rules of res judicata could or should control in diversity actions. Decisions such as *Gatzemeyer* and *Gasbarra* which simply cite the *Erie* doctrine and then blindly apply state law of res judicata in diversity suits shed little light on the substance/procedure conflict of *Erie* and the issue of why state, and not federal, law controls in such actions.

The United States Court of Appeals for the Third Circuit has explored the issue more thoroughly in the decision of *Hartmann v. Time, Inc.*[88] The case concerned Hartmann's claim that he was libeled by certain material printed in "Life" magazine, which was published by Time, Inc.[89] Hartmann initiated the first suit in the District Court for the District of Columbia. The district court dismissed the action on the merits as being barred by the statute of limitations.[90] Hartmann then filed suit in a New York state court which also dismissed on the grounds of statute of limitations.[91] The third suit was filed by Hartmann in a Massachusetts state court, and Time filed answers setting up defenses of the statute of limitations and res judicata based on the previous two decisions. The jury rendered a verdict for Time, but the record did not state whether the judgment was based on the statute of limitations defense or the res judicata defense.[92] In a fourth suit, filed in the District Court for the Eastern District of Pennsylvania and based on diversity jurisdiction, the court held that res judicata barred the suit, and thus granted Time's motion for summary judgment.[93] Hartmann appealed to the Third Circuit.[94]

After discussing whether state or federal rules of res judicata should apply in diversity actions, the court stated that "we ourselves must follow the law and policy of Pennsylvania in respect to the plea of res judicata."[95] The court then determined that Pennsylvania law of res judicata required that the first action "will bar an action when a court of competent

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[85] *Id.* at 123.
[86] *Id.*
[87] *Id.* at 122 (citations omitted).
[88] 166 F.2d 127 (3d Cir. 1948).
[89] *Id.* at 131.
[90] *Id.* at 136.
[91] *Id.*
[92] *Id.* at 136-37.
[93] *Id.* at 131.
[94] *Id.* at 130.
[95] *Id.* at 138.

jurisdiction has determined a litigated cause on its merits, and not otherwise."[96] Because Pennsylvania law dictated that "a judgment rendered on the ground of the statute of limitations usually is not bar to a subsequent suit,"[97] the court held that the District of Columbia and New York suits would not be a bar to the new actions.[98]

Ultimately the Third Circuit reversed the district court because the record was unclear whether the Massachusetts court's decision was based on res judicata or the expiration of the applicable statute of limitations.[99] If the statute of limitations were the basis, the district court could, under Pennsylvaina law, entertain a new suit because no adjudication on the merits had occurred.[100] Yet if the Massachusetts decision were based on res judicata, the district court must recognize it "since it is now settled that a judgment must be given full faith and credit, even though erroneous, if there was jurisdiction."[101] Due to the ambiguity of the Massachusetts decision, the plea of res judicata in the district court could not be upheld until the nature of the previous decision could be ascertained.[102]

Alternatively, the *Hartmann* court could have used Federal Rule 41(b)[103] which states that a prior dismissal is on the merits unless it is designated otherwise. Although Rule 41(b) is generally applied by a court to its own dismissals,[104] one federal court has extended its use to include a prior adjudication by any federal court.[105] Thus, the district court in *Hartmann* could have used a Federal Rule of res judicata and extended the use of Rule 41(b) to the dismissal of the District Court for the District of Columbia, finding it to be "on the merits." The previous dismissal

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[96] *Id.*

[97] *Id.* (footnote omitted).

[98] *Id.*

[99] *Id.* at 139.

[100] *Id.* at 138 (citing Restatement of Judgments § 49 (1942) and *In re* Philadelphia Elec. Co., 352 Pa. 457, 43 A.2d 116 (1945)).

[101] 166 F.2d at 139 (citing Milliken v. Meyer, 311 U.S. 457 (1940)).

[102] 166 F.2d at 139.

[103] FED. R. CIV. P. 41(b). The Rule provides, in part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Id.

[104] *See* 18 WRIGHT & MILLER, *supra* note 15, § 4441 (1981). WRIGHT & MILLER states:

> The traditional rule has been that a forum applies its own period of limitations as a matter of procedure . . . . This rule has led in turn to the general conclusion that dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations.

Id. at 369. (footnote omitted). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 comments a & b (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 19 comment f (1982).

[105] *See* Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962). *See infra* notes 171-77 and accompanying text.

in federal court could be a prior adjudication under a federal practice and thus a bar to the plaintiff's present claim. A different result, then, could have occurred if the court had chosen to apply a federal rule of res judicata, instead of the state rule which dictated the district court's dismissal was not a bar.

1. State Laws of Res Judicata Create Vital Rights.—The *Hartmann* court relied on several Supreme Court cases[106] decided in the wake of *Erie* to determine whether state or federal law controls in diversity cases.[107] In light of these Supreme Court decisions, the *Hartmann* court concluded that the state rules of res judicata created vital rights for the parties so that the differing federal procedure had to give way to state law.[108]

In *Angel v. Bullington*,[109] one of the cases cited by the *Hartmann* court, the Supreme Court stated in broad terms that when a federal court is exercising diversity jurisdiction, the federal court "must follow state law and policy."[110] The *Hartmann* court recognized this as persuasive dictum, and interpreted the decision as stating "categorically that a district court of the United States is a court of the State in which it sits insofar as diversity cases are concerned."[111] Although this interpretation of the *Angel* decision may be strained, it is reinforced by an earlier statement by Justice Frankfurter in *Guaranty Trust* that federal courts exercising diversity jurisdiction constitute "another tribunal, not another body of law."[112] Justice Frankfurter concluded:

> The source of substantive rights enforced by a Federal court under diversity jurisdiction . . . is the law of the States. Whenever that

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[106]*E.g.*, Angel v. Bullington, 330 U.S. 183 (1947); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Palmer v. Hoffman, 318 U.S. 109 (1943); Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487 (1941).

[107]166 F.2d at 138.

[108]*Id.*

[109]330 U.S. 183 (1947).

[110]*Id.* at 192. In *Angel*, the plaintiff brought a second suit in federal court based on diversity jurisdiction. The first suit was in state court, where the North Carolina Supreme Court held that a state statute, which barred the plaintiff's recovery, was constitutional. The United States Supreme Court held that the federal court was bound by the North Carolina decision, stating:

> [A] North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. . . .[D]iversity jurisdiction must follow state law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.

Id. at 191-92.

[111]166 F.2d at 138. The reference to the *Angel* case is dictum as to the question in *Hartmann* because *Angel* involved a federal question of the constitutionality of a statute, and not simply diversity jurisdiction.

[112]326 U.S. at 112. *But see* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958) (federal system is an independent system even under diversity jurisdiction).

> law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court . . . .[113]

According to this view, when a state declares substantive rights either by statute or case law, federal courts exercising diversity jurisdiction are bound by these laws.

Even if a federal diversity court takes a very broad outlook of the federal procedural laws which should control, the operation of state laws of res judicata do create substantive rights in litigants. Similar to the differing time periods of statutes of limitations in state and federal law,[114] state rules of bar and merger may allow a party to initiate and litigate a second suit where federal rules would hold the second suit as barred by or merged in the first action.[115] The stricter federal law would narrow a litigant's right to bring a later suit and would lead to a different result than if state law were used. As the Supreme Court in *Guaranty Trust* stated, "As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."[116] Because the outcome of the litigation would be different under state and federal rules, the state law creates substantive rights for the litigants and should control in diversity suits.

While it may be argued that every difference between state and federal law would lead to a different outcome,[117] res judicata is one doctrine wherein the differences in law may vitally affect litigants' rights. As Professor Wright notes, "Claim preclusion applies 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' "[118] The Restatement (Second) of Judgments offers a good example of the operation of claim preclusion in its rule for merger, stating that "[i]n an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action."[119] For example, if a defense such as contributory negligence were available in an action, but the defendant did not raise it and loses the case, he will not be able to assert that defense when the

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[113]326 U.S. at 112.

[114]*See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945). *See supra* notes 38-42 and accompanying text.

[115]*See* Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948). *See supra* notes 88-105 and accompanying text.

[116]326 U.S. at 110 (citation omitted). *See supra* notes 37-41 and accompanying text.

[117]*See infra* note 144 and accompanying text.

[118]C. WRIGHT, *supra* note 1, at 681 (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1877)).

[119]RESTATEMENT (SECOND) OF JUDGMENTS § 18(2) (1982).

plaintiff sues on the judgment.[120] Thus, the effect of claim preclusion is to grant special rights to a party in a subsequent action. A previous valid judgment prevents a second action not only on the claim itself, but also on all matters that might have been offered to prove or defeat the claim.[121] With such far-reaching effects, it seems preferable to treat res judicata as a substantive right.

Moreover, viewing state laws of res judicata as creating the substantive rights of litigants is closely related to important policies behind res judicata such as preventing harrassing litigation and insuring certainty for court decisions. As the *Hartmann* court noted, every litigant is entitled to have a court of competent jurisdiction determine his cause of action.[122] Once the claim has been heard on the merits, however, the defendant is granted the right by operation of res judicata to be protected from harassing multiple suits on the same claim.[123] According to one commentator, prevention of harassment is necessary because otherwise a plaintiff could relitigate the same claim until he was successful, placing an unfair burden on the defendant to defend each suit.[124] Because res judicata creates substantive rights in both litigants by allowing the plaintiff his one day in court, and the defendant the assurance of protection from multiple suits, state rules of res judicata should control in federal diversity suits.

2. The Federal Rules of Civil Procedure Do Not Apply to Res Judicata.—In addition to the substantive/procedural issue of res judicata, another consideration in determining which laws control in diversity suits is whether the matter is covered by the Federal Rules of Civil Procedure.[125] If so, the Federal Rule would prevail over a similar state rule.[126] One such Federal Rule is 8(c), which provides: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . res judicata."[127] In *Palmer v. Hoffman*,[128] a question arose in a diversity action over allocating the burden of proof which is also listed among the defenses in Federal Rule 8(c).[129] In *Palmer*, the state law placed the burden of proof for lack

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[120]*See id.* § 18 comment c.

[121]*Id.*

[122]166 F.2d at 138.

[123]Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 34 (1964) [hereinafter cited as *Rationale of Preclusion*].

[124]*Id.*

[125]*See supra* notes 45-52 and accompanying text.

[126]Hanna v. Plumer, 380 U.S. 460 (1965).

[127]FED. R. CIV. P. 8(c). For a discussion of whether other Federal Rules may control, *see infra* notes 160-63 and accompanying text.

[128]318 U.S. 109 (1943).

[129]FED. R. CIV. P. 8(c). Rule 8(c) provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute

of contributory negligence on the plaintiff. The district court found, however, that the Federal Rules should apply in the diversity suits because Rule 8(c) addressed the issue of burden of proof.[130] Thus, the district court held that because the Federal Rules required the defendant to affirmatively plead contributory negligence, the defendant, not the plaintiff, had the burden of proving contributory negligence.[131] The Supreme Court reversed, stating that "Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases . . . must apply."[132] Rule 8(c), then, cannot be used to determine the substantive laws of the affirmative defenses listed therein, but merely prescribes the form of pleading the parties in federal court must observe.

Likewise, by requiring the defendant to affirmatively plead the defense of res judicata, Rule 8(c) merely prescribes the form of pleading. Rule 8(c) does not require federal law to control in diversity suits. Therefore, state laws of merger and bar should control. In the Supreme Court decision of *Walker v. Armco Steel Corp.*,[133] the Court held that when a Federal Rule and a state statute do not directly clash, then the two "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict."[134] The *Walker* analysis can be applied to res judicata and Rule 8(c). The Federal Rule would control the manner of pleading, and the state law of bar and merger would control the substantive effect of such a plea.

B. Federal Courts Applying Federal Res Judicata Law

Several of the federal courts have applied federal law of res judicata when jurisdiction is based on diversity of citizenship.[135] They have generally based their holdings on the Supreme Court decision of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[136] In *Byrd*, the plaintiff initiated a personal injury suit in the District Court for the Western District of South

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of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation. *Id.*

[130]318 U.S. at 116.

[131]*Id.* at 116-17.

[132]*Id.* at 117.

[133]446 U.S. 740 (1980) (addressing a state statute of limitations and the filing of a complaint in federal court). *See also* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (addressing the same issue as *Walker*).

[134]446 U.S. at 752.

[135]*See* Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975); Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962).

[136]356 U.S. 525 (1958). *See, e.g.*, Hunt v. Liberty Lobby, Inc., 707 F.2d 1483, 1496 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710, 718 (5th Cir. 1975); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962).

Carolina, invoking diversity jurisdiction. The defendant argued that the plaintiff was a statutory employee and limited, therefore, to workmen's compensation benefits under South Carolina law. South Carolina law required the judge and not the jury to determine whether the plaintiff was a statutory employee.[137] The district court followed the South Carolina law.[138] The United States Supreme Court reversed and held that the issue was to be determined by a jury, in spite of the South Carolina law.[139]

In an opinion by Justice Brennan, the Court offered two reasons for following federal law rather than the *Erie* doctrine. First, the Court stated that the South Carolina rule was one of form, and did not involve rights and obligations created by the state since it did not appear that the rule was promulgated for any special reason.[140] Second, the Court found that there were affirmative countervailing considerations,[141] namely the seventh amendment right to trial by jury,[142] which required that the federal law be used.[143]

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[137]356 U.S. at 534.

[138]*Id.* at 529.

[139]*Id.* at 538.

[140]*Id.* at 536. The Court found that the South Carolina court, in deciding that the judge and not the jury should decide the issue, did not offer any reasons for its decision. *Id.* In concluding that the matter was one of procedure to be governed by federal rules, the Court stated:

> We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties.

Id. (citations omitted). Moreover, the Court, in its statement, echoed the words of the Rules Enabling Act, which states that the Supreme Court has the power to prescribe rules for "the forms . . . practice and procedure," but not "enlarge or modify any substantive right." 28 U.S.C. § 2072 (1976). *See supra* notes 46-47 and accompanying text. Thus, the Supreme Court held that the state law indicating that a judge was to be the fact-finder of a certain issue instead of a jury is more a matter of procedure and not a substantive right created by the state. 356 U.S. at 536.

[141]356 U.S. at 537. The affirmative countervailing consideration stated by the Court for disregarding the federal practice is based on the seventh amendment of the Constitution, the right to trial by jury in a civil suit. *Id.*

[142]U.S. CONST. amend. VII. The seventh amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

Id. The Court stated that "in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." 356 U.S. at 538. Thus the Supreme Court considered the *Erie* doctrine and found it not to be absolute in the case where state law altered the roles of judge and jury. The strong federal policy based on the seventh amendment was a reason for avoiding the *Erie* doctrine and the state law in favor of the federal law in *Byrd*. For discussion of the importance of the strong federal policy being based on a constitutional right, see *infra* note 201.

[143]Some commentators have noted that the Court, in its discussion of the seventh

The *Byrd* decision has been used by some federal courts to justify applying federal res judicata laws in diversity actions. These courts have attempted to utilize the standard enunciated in *Byrd*: 1) that the state law is a form and not a state-created right, or 2) that there are affirmative countervailing considerations. Under the *Byrd* decision, if either of the two categories actually justify using federal rules of res judicata, the federal courts could bypass the *Erie* doctrine and ignore state law of res judicata in diversity actions.[144]

1. Res Judicata Affects Only the Form of Recovery.—The language of the *Byrd* decision, that state laws of procedure may be avoided if they are merely forms of practice and not state-created substantive rights,[145] has been noted by the federal courts which apply federal rules of res judicata in diversity actions. In *Hunt v. Liberty Lobby, Inc.*,[146] for example, the plaintiff received a judgment against the defendant in the District Court for the Southern District of Florida, which had diversity jurisdiction.[147] The defendant appealed the judgment.[148] While the appeal was pending, the plaintiff sued on the judgment in the District Court for the District of Columbia where the defendant's principal assets were located. The defendant moved to dismiss the action, claiming that under Florida law of res judicata, a judgment pending appeal is not final and cannot be sued upon in another court.[149] The district court agreed and

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amendment, was attempting to avoid a constitutional issue. *See, e.g.*, Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 450 (1961) (stating that the Court implicitly decided the case on constitutional grounds, while avoiding the appearance of a constitutional decision).

[144]The Supreme Court in *Byrd* also addressed the issue of "outcome determination" noted in the *Guaranty Trust* case as a means for determining state and federal laws in diversity actions. Guaranty Trust Co. v. York, 326 U.S. 99, 109-10 (1945). *See supra* notes 37-42 and accompanying text. The *Byrd* Court noted that if " 'outcome' [were] the only consideration, a strong case might appear for saying that the federal court should follow state practice." 356 U.S. at 537. This statement is important in signalling the decline of outcome determination as the test in deciding whether state or federal law should apply in diversity actions. Seven years later, the Court openly criticized the outcome-determination test. In *Hanna v. Plumer*, the Court stated, " 'Outcome-determination' analysis was never intended to serve as a talisman [for whether state or federal law controlled in diversity actions]." 380 U.S. 460, 466-67 (1965). The rationale of abandoning outcome determination as the test is that when the state and the federal rules are different, "*every* procedural variation is 'outcome-determinative.' " *Id.* at 468. Thus, the *Hanna* Court pointed out the fallacy of the outcome-determination test: if the federal and state procedural laws clash, the result of using the federal law instead of the state law would always lead to the possibility of a different outcome, so that state law would always control.

[145]356 U.S. at 536. *See supra* note 140 and accompanying text.

[146]707 F.2d 1493 (D.C. Cir. 1983).

[147]*Id.* at 1494.

[148]*Id.*

[149]*Id.* The status of the Florida law on the question of the finality of a judgment on appeal is unclear. The *Hunt* court stated:

granted the motion.[150] The Court of Appeals for the District of Columbia Circuit reversed, holding that federal rules of res judicata, and not the Florida state rules, apply in diversity actions.[151] In citing language from the *Byrd* decision,[152] the appellate court reasoned that "[b]ecause a rule governing the res judicata effect of a judgment pending appeal affects only the timing of recovery, the rule can scarcely be described as bound up with the definition of the rights and obligations of the parties under Florida . . . law."[153] Using the rationale that res judicata affected only the timing of recovery, the appellate court concluded that "there is little likelihood that our ruling will encourage forum-shopping."[154] The court reasoned that the Florida rule merely delayed recovery, and did not entirely bar it.[155] Because the court decided that the difference in the state and federal rules was one of form, not substance, federal law was applied.

The court's reasoning, that the result will lead to minimal forum-shopping, is not persuasive on the facts of the case. There was evidence in the case that the defendant was in financial trouble, shown by the fact that the defendant corporation was unable to meet the cost of a supersedeas bond.[156] If the defendant's assets were quickly dwindling, the

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> Our own reserach has been . . . fruitless . . .; apparently, there *is* no Florida law on the question. Fortunately, our ruling that federal law governs spares us from embarking on the hazardous quest of predicting how the Florida Court of Appeals would resolve the issue if squarely presented to it.

Id. at 1497 n.6.

[150] *Id.* at 1494.

[151] *Id.* at 1497. In *Hunt*, the court noted that the Third Circuit had ruled that state rules of res judicata applied in diversity actions. *Id.* at 1497 n.5. The court stated, however, "we simply note that the [Third Circuit] has not yet reassessed the issue in light of recent Supreme Court decisions." *Id.*

Assuming that the *Hunt* court is referring to the *Byrd* and *Hanna* cases as the recent Supreme Court decisions, it is interesting to note that the Third Circuit has indicated that it would still follow the ruling that state law of res judicata applies in diversity cases, even after these Supreme Court decisions. *See* Murphy v. Landsburg, 490 F.2d 319, 322 n.4 (3d Cir. 1973); Gambocz v. Yelencsics, 468 F.2d 837, 841 n.4 (3d. Cir. 1972); Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Casualty Co., 411 F.2d 88, 94 (3d. Cir. 1969).

[152] 356 U.S. at 536. *See supra* note 140 and accompanying text.

[153] 707 F.2d at 1496. The court in *Hunt* also addressed the issue of outcome determination, deciding that the choice of law would not result in a different outcome if state law were applied. *Id.*

[154] *Id.* For a discussion of forum shopping, see *supra* notes 27-29 and accompanying text.

[155] 707 F.2d at 1494.

[156] *Id.* at 1494. Federal Rule 62(d) provides:

> When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . . . The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Fed. R. Civ. P. 62(d). As Professor Moore notes, the effect of Rule 62(d) is:

> [A] party who desires a stay . . . pending appeal is normally required to file

plaintiff would want to sue on the judgment immediately in order to reach the defendant's assets before bankruptcy. This situation might lead a plaintiff to prefer a federal court, where the judgment on appeal would be res judicata, over the state court, where a judgment could not be sued on until the appeal procedure ended. Consequently, the difference between state and federal law would undoubtedly affect the choice of the court by the plaintiff. The *Hunt* court, although admitting that the defendant could not pay the supersedeas bond, chose to ignore this fact when it decided that the plaintiff would have no reason to forum shop between state and federal court.[157]

The strong nexus between the doctrine of res judicata and the Federal Rules is often cited when federal and not state law of res judicata is followed.[158] As stated by the United States Court of Appeals for the Fifth Circuit in *Aerojet-General Corp. v. Askew*:[159]

> [S]everal procedural elements of federal practice affect the doctine of res judicata. For example, federal law on finality of judgments . . . and compulsory counterclaims [under Federal Rule] 13(a), is often determinative of pleas of res judicata. We see no persuasive reason to look to state law for some elements of res judicata, such as the scope of the cause of action or similarity of parties, in light of the prominent influence of federal law on the elements of the doctrine.[160]

Thus, the Fifth Circuit viewed res judicata as procedural because it is closely connected to the Federal Rules in some instances. In categorizing res judicata as procedural and not substantive in nature, the court concluded it could bypass the *Erie* doctrine's requirement of following state substantive law.[161]

In commenting upon the *Aerojet* court's proposition that the Federal Rules and certain aspects of res judicata are so related that the federal practice must control, Professor Moore reasons that this is a sound principle for issue preclusion, but not claim preclusion.[162] As Professor Moore states:

> a bond in a sum sufficient to protect the rights of the party who prevailed in the district court. The amount of the bond and the sufficiency of the sureties are matters entrusted to the determination of the district court.

9 J. MOORE & B. WARD, *supra* note 3, ¶ 208.06[1].

[157]707 F.2d at 1496.

[158]*See Hunt*, 707 F.2d at 1496; Aerojet-General Corp. v. Askew, 511 F.2d 710, 717 (5th Cir. 1975)(dictum); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962).

[159]511 F.2d 710 (5th Cir. 1975).

[160]*Id.* at 717 (citation omitted). For the facts of *Aerojet*, see *infra* notes 186-93 and accompanying text.

[161]511 F.2d at 718.

[162]1A J. MOORE & B. WARD, *supra* note 3, ¶ 0.311[2], at 3182. The aspects of

> [T]he [*Aerojet*] decision goes too far in holding that the federal law of res judicata determines the scope of the cause of action, which usually involves the question whether a party may split a cause of action. It is elementary under *Erie* state law determines what elements a claimant must prove to recover on the state law claim . . . . [S]tate law ought to govern the scope of a state cause of action when considered in the context of a res judicata defense.[163]

There is a close connection between the state's definition of a cause of action and the operation of res judicata which precludes that cause from being relitigated. This nexus affects the substantive rights of the litigants sufficiently to overshadow any connection between the operation of claim preclusion and the Federal Rules of Civil Procedure.[164]

2. Federal Res Judicata Laws Should Control for Policy Reasons.— In the *Byrd* decision, the Supreme Court stated a second reason for abandoning the state practice in favor of the federal law of trial by jury, that of "affirmative countervailing considerations."[165] The advocates of using federal law of res judicata have picked up on the language in *Byrd* of "affirmative countervailing considerations" to justify the use of federal laws of res judicata.[166] These justifications include: 1) a federal court's

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preclusion which Moore refers to as being closely related to the Federal Rules are privity, mutuality, and a determination of an actually litigated issue. *Id.*

[163]*Id.* (footnotes omitted).

[164]Moore also agrees with the *Aerojet* opinion with respect to the compulsory counterclaim bar under Federal Rule 13(a). Rule 13(a) provides:

> *Compulsory Counterclaims*: A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

FED. R. CIV. P. 13(a). Moore states:

> Whether a claim in the second federal suit arises out of the transaction or occurrence sued on in the first federal suit ought to be determined as a matter of federal law. Since Rule 13(a) expressly defines a compulsory counterclaim and the effect of failure to bring it in the first action, the rule of *Hanna v. Plumer* governs and therefore Rule 13(a) applies even though the effect may be to ignore the res judicata rules of the forum state.

1A J. MOORE & B. WARD, *supra* note 3, ¶ 0.311[2], at 3182-83 (footnotes omitted).

[165]356 U.S. at 537. *See supra* notes 141-43 and accompanying text.

[166]*See Hunt*, 707 F.2d at 1496; *Aerojet*, 511 F.2d at 718; Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962) (all citing the "affirmative countervailing considerations" language of *Byrd*).

need to determine the scope of its own judgment;[167] 2) the preservation of the Federal Rules of Civil Procedure;[168] 3) a federal court's need to be a reliable forum;[169] and 4) the need for judicial economy.[170]

The first justification, a federal court's need to determine the scope of its own judgment, was explored by the United States Court of Appeals for the Second Circuit in *Kern v. Hettinger.*[171] The court was faced with a prior decision of the District Court for the Northern District of California based on diversity jurisdiction which dismissed the case for lack of prosecution.[172] When a diversity suit was initiated in a New York federal court, it was dismissed as res judicata because of the prior action of the California court. On appeal, the Second Circuit found that the first suit in the California federal court was res judicata.[173] The court extended Federal Rule 41(b)[174] to apply to dismissals rendered by another federal court; and, held that because the dismissal was not designated "without prejudice," the second action was barred by res judicata.[175] The court, relying on the *Byrd* decision, reasoned: "One of the strongest policies a court can have is that of determining the scope of its own judgments."[176] Thus, the *Kern* court held that the overriding federal policy of a court's determining the effect of its own judgment was a sufficient "countervailing consideration" to ignore the state law of res judicata.[177]

One problem with the Second Circuit's analysis is that Federal Rule 41(b) generally applies only to courts determining the scope of their own prior judgments.[178] As with all pleas of res judicata in a court other than

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[167]*See* Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962).

[168]*Id.*

[169]*See Aerojet*, 511 F.2d at 716 (dictum).

[170]*See* Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1742 (1968) [hereinafter cited as *Res Judicata/Preclusion*].

[171]303 F.2d 333 (2d Cir. 1962).

[172]*Id.* at 340.

[173]*Id.* Five defendants were named in the action. The district court's dismissal applied only to two defendants, Western Pacific Railroad Company and A. J. Hettinger, Jr., a member of Western Pacific's board of directors. Western Pacific was a party to the earlier suit dismissed for lack of prosecution in the United States District Court for the Northern District of California. In that action Hettinger was named as a defendant but was not served with process and did not make an appearance. Hettinger was dismissed as a defendant on the basis of collateral estoppel. *Id.* at 339. The Second Circuit affirmed the dismissal of Western Pacific, but reversed the dismissal of Hettinger on the basis of collateral estoppel because there was no adjudication on the merits of the case. *Id.* at 341.

[174]FED. R. CIV. P. 41(b). For the text of Rule 41(b), see *supra* note 103.

[175]303 F.2d at 340 (citation omitted).

[176]*Id.*

[177]*Id.*

[178]*See* 18 WRIGHT & MILLER, *supra* note 15, at 381. *See supra* note 104 and accompanying text.

the court which rendered the judgment, full faith and credit[179] requires the second court to examine the scope of the first court's judgment. Hence, the *Kern* court should have determined what effect the California district court would have given to its own judgment. The California district court may have chosen to use California state laws of res judicata, and not federal laws.[180]

In addition to the policy that a court ought to be able to determine the scope of its own judgment, the *Kern* court offered another affirmative countervailing consideration to justify ignoring state rules of res judicata in favor of federal law: "It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity."[181] Thus, the Second Circuit justified applying the federal laws of res judicata on the basis of preserving the Federal Rules of Civil Procedure.

The assertion that the power of the Federal Rules of Civil Procedure would be undermined if state rules of res judicata were used in diversity actions is without merit. The Federal Rules and the state laws governing other "procedural" matters have co-existed with relatively few problems. Examples of where the Federal Rules and state procedural laws co-exist include statutes of limitations,[182] burdens of proof,[183] and conflict-of-laws rules.[184] The Federal Rules have not been negated in these areas, but are held to control only those matters that they address specifically.[185] Thus, it is doubtful whether the Federal Rules of Civil Procedure would be stripped of their power if state laws of res judicata were applied in diversity actions.

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[179]U.S. CONST. art. VI, § 1; 28 U.S.C. § 1738 (1982). *See supra* notes 53-54 and accompanying text.

[180]*See* Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948) (federal court used state laws for issue of effect of prior dismissal). *See supra* notes 88-105 and accompanying text.

[181]303 F.2d at 340.

[182]*See* Walker v. Armco Steel Corp., 446 U.S. 740 (1980); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) (holding that state rules for meeting the statute of limitations are independent of service of process in federal diversity suits). *See supra* notes 133-34 and accompanying text.

[183]*See* Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (holding that state burden of proof allocation is not disturbed by Federal Rule 8(c) in diversity suits). *See supra* notes 128-32 and accompanying text.

[184]*See* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975); Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that federal courts exercising diversity jurisdiction must follow the conflict-of-laws rules of the state in which they sit). *See supra* note 43 and accompanying text.

[185]*See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980). The Supreme Court stated that when the Federal Rules of Civil Procedure and a state statute do not directly clash, the two "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict." *Id.*

A third policy argument for applying federal laws of res judicata, that federal courts need to be reliable forums, was espoused by the Fifth Circuit in *Aerojet-General Corp. v. Askew*.[186] The plaintiff, Aerojet, obtained a judgment for specific performance on a lease with an option to purchase. The suit was in federal court based on diversity jurisdiction and the defendant was the Board of Trustees of the Internal Improvement Trust Fund.[187] After the judgment was affirmed on appeal, Metropolitan Dade County brought a suit against the Board of Trustees in Florida state court.[188] Dade County asserted that it was entitled to the land under a Florida statute,[189] an issue not raised in the first suit. The Florida Supreme Court ruled in favor of Dade County.[190] Aerojet then brought suit against both Dade County and the Board of Trustees in federal court, invoking diversity and federal question jurisdiction.[191] Aerojet asserted that the federal court's first judgment was res judicata and the defense offered by the statute was barred.[192] Although a federal question was involved in the suit, the Fifth Circuit affirmed the judgment for Aerojet and stated that federal laws of res judicata control in actions based on diversity of citizenship.[193]

This sequence of events raised a major concern which the *Aerojet* court noted: "If state courts could eradicate the force and effect of federal court judgments through supervening interpretations of the state law of res judicata, federal courts would not be a reliable forum for final adjudication of a diversity litigant's claims."[194] Thus, the overriding federal policy of preserving the integrity of the federal courts weighed heavily in the court's choice of federal laws of res judicata.[195]

While there is much merit to this argument, it is important to realize that the effect of the court's ruling is that federal courts are free from supervening interpretations of state law for res judicata purposes, whereas state courts are bound by the new interpretations. The Florida Supreme

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[186]511 F.2d 710 (5th Cir. 1975).

[187]*Id.* at 713.

[188]*Id.* at 714.

[189]FLA. STAT. § 253.111 (1975).

[190]511 F.2d at 714.

[191]*Id.*

[192]*Id.*

[193]*Id.* at 716 (dictum).

[194]*Id.* (footnote omitted).

[195]Preserving the integrity of the decision of courts is closely related to one of the policies behind res judicata: the prestige of courts in commanding respect for their decisions. As Professor Vestal states:

> This general respect for decisions of courts supports the generally felt attitude that decisions in earlier cases should not be undercut promiscuously by decisions in later cases. The later decisions should—unless the contrary—be consistent with earlier decisions. Only thus can the respect for the court system be maintained.

Rationale of Preclusion, supra note 123, at 33 (footnote omitted).

Court has ruled that "res judicata is not a defense in a subsequent action where the law under which the first judgment was obtained is different from that applicable to the second action."[196] Regardless of the policies which lie behind this rule, the state courts of Florida are subject to the possiblity of supervening interpretations of state law by the Florida Supreme Court. The Fifth Circuit, however, reasoned that the federal courts exercising diversity jurisdiction should not be bound by this Florida policy on the grounds that they could not be reliable forums if subject to the supervening interpretations of state law.[197] But when the policy of being a reliable forum is compared with the goals of the *Erie* doctrine, including discouragement of forum shopping and avoidance of inequitable administration of the laws, the preservation of the integrity of federal court judgments becomes less important. The rights and obligations of the parties created or extinguished by a change in state law should be honored by a federal court exercising diversity jurisdiction.

Another "overriding federal policy" used to support applying federal res judicata law in diversity suits is judicial economy.[198] As one commentator has stated:

> In view of the enormous docket loads of the federal courts, one might well conclude that the federal courts must consider the wise use of the judges' time to be of paramount importance. If this is true, the law of preclusion, which serves to bar unnecessary litigation, would be of great concern to the federal courts and this particular federal interest may be overriding regardless of whether the court handing down the first judgment was a state or federal court.[199]

Implicit in this argument is the assumption that the federal system of res judicata is more efficient than the state's rules. Even if this assumption were true, one major problem remains concerning these overriding federal policies or reasons for choosing federal over state laws of res judicata.

The overriding federal policy announced in the *Byrd* decision was based on the Constitution, more specifically the seventh amendment right to trial by jury.[200] A right guaranteed in the Constitution is the strongest

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[196]Thompson v. Thompson, 93 So. 2d 90, 92 (1957).

[197]511 F.2d at 716.

[198]*Res Judicata/Preclusion, supra* note 170, at 1742.

[199]*Id.* (footnotes omitted). One of the recognized policies of res judicata is based on an efficient use of the courts "in seeing that there is an end to litigation." *Rationale of Preclusion, supra* note 123, at 31. As Professor Wright has noted, the work load in the courts has become so great that "courts today are having difficulty giving a litigant one day in court. To allow a litigant a second day is a luxury that cannot be afforded." C. WRIGHT, *supra* note 1, § 100A, at 678.

[200]356 U.S. at 539. *See supra* notes 141-42 and accompanying text.

countervailing consideration a federal court would protect in lieu of a contrary state law or practice.[201] The federal courts do have an interest in determining the scope of their own judgments and preserving the Federal Rules of Civil Procedure. Likewise, federal courts should be reliable forums and economical. Nevertheless, none of these policies is as fundamental as a right guaranteed by the Constitution. Thus, it is questionable whether these policies offered by federal courts for choosing federal rules of res judicata over state rules are so important so as to disregard the state created rights and obligations stemming from res judicata.

IV. The Goals of *Erie* Fulfilled by Following State Law of Res Judicata

The goals of the *Erie* doctrine, discouragement of forum shopping[202] and avoidance of inequitable administration of the law,[203] would best be fulfilled in following state laws of bar and merger in federal diversity cases. If state law controlled, a party to a law suit would have no incentive to forum shop between federal and state courts when diversity jurisdiction is available, because the same rules of res judicata would apply to both systems. For example, if a plaintiff's claim is barred under state law so that he could not initiate a second suit, he could not avoid this result by bringing the action in federal court under diversity jurisdiction. Although the federal law might allow the plaintiff to relitigate the claim, the federal court would apply state law so that the plaintiff would not have a reason to choose either state or federal diversity action over the other. Secondly, no discrimination against a citizen of the forum state would occur when a citizen of a different state invoked diversity jurisdiction, because the same rules would apply to both systems. Therefore, if state and federal diversity-based courts applied the state's laws of bar and merger, both the initiator of the suit and the defender against the claim would receive the same treatment in federal or state court. Thus, the *Erie* decision's goals of preventing forum shopping and realizing equal protection under the law would be achieved.

One interesting aspect of the opinions which choose federal law over state law is the lack of discussion concerning the goals of *Erie*. One court which did address the issue was the District Court for the District of Maryland in the decision of *J. Aron & Co. v. Service Transportation*

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[201] *See, e.g.*, Smith, *supra* note 143. Professor Smith states:

> [The] inference is therefore strong that the [*Byrd*] decision was in fact based solely on the constitutional ground, and that its effect is thus limited to questions relating to the right to a jury in a federal court. Reinforcing this view is the fact that protection of the right to trial by jury is a function to which a majority of the Court has devoted itself with enthusiasm.

Id. at 451 (footnote omitted).

[202] *Erie*, 304 U.S. at 75. *See supra* notes 27-29 and accompanying text.

[203] 304 U.S. at 74-75. *See supra* notes 25-26 and accompanying text.

Co.[204] As to the avoidance of inequitable administration of the laws, the court stated:

> [I]t is clear that the merits of the case which went to judgment . . . were governed by the law of Maryland; to argue from this that the federal court, as part of a constitutionally established judicial system equal in dignity to the state judicial system, cannot do its own housekeeping and determine the scope of its own judgments because the end result might be different in a state court is to stretch the . . ."outcome determination" test well beyond the limits the Supreme Court has set for it.[205]

Although "outcome determination" is not the only test for deciding whether state or federal laws should apply,[206] the court avoided the consideration of whether the state-created rights and obligations were affected.[207] The basic function of claim-preclusion, to merge a claim into a judgment which is final or to bar a claim from being reasserted, is promulgated by a state to create such rights and obligations for its citizens. Such rights should not be aborted in the interest of judicial "housekeeping" in the federal courts based on diversity jurisdiction.

Secondly, the court in *Aron* addressed the other goal of *Erie*, discouragement of forum-shopping, reasoning that:

> It strains credulity (not to mention fundamental notions of good faith and fair play) to assume that a party would choose a state court over a federal court (or vice versa) on the basis that, if he were to lose, he could keep dragging the defendant back into litigation on different theories until he prevails or he exhausts the capacity of his legal imagination, whichever comes first.[208]

Under this line of reasoning, one wonders why the doctrine of res judicata exists at all, if its basic function is to bring litigation to an end.[209] As one commentator has warned:

> One should not make the mistake of assuming that a litigant would not engage in such harassment. Even with the controlling concept

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[204]515 F. Supp. 428 (D. Md. 1981).

[205]*Id.* at 439. Judicial housekeeping, or efficient use of the court system, is one of the recognized policies of res judicata. *See supra* note 199.

[206]*See* Hanna v. Plumer, 380 U.S. 460, 467 (1965); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958). *See supra* note 144.

[207]*See* Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945). *See supra* notes 37-42 and accompanying text.

[208]515 F. Supp. at 439.

[209]As James and Hazard recognize, the concept of res judicata is based on the fundamental policy that a "party should not be allowed to relitigate a matter that he already had opportunity to litigate." F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.2, at 531 (2d ed. 1977).

> of preclusion, a number of litigants attempt to recover in successive suits although they have lost in earlier attempts. If there were no such concept, the multiplicity of litigation would be hard to imagine.[210]

Thus, although good faith and fair play might dictate otherwise, few litigants would choose to limit the number of times they would be allowed a chance to recover. If differing standards of res judicata exist in federal and state courts, a party would be likely to choose the court with the standard most favorable to his case.

Finally, the court in *Aron* expressed the fear that if state rules of res judicata were applied instead of federal laws, the policy behind the *Erie* doctrine of prevention of forum shopping would be defeated.[211] The court stated that to apply "individual state laws really *would* pose a danger of forum shopping, this time between different federal districts."[212] It is true that one of the reasons for the *Erie* decision was the need for "equal protection of the law."[213] But the Supreme Court in *Erie* was not speaking of uniformity of result throughout the federal system in diversity actions. The Court explicitly stated, "[I]n attempting to promote uniformity of law throughout the United States, the doctrine [of applying federal substantive law in diversity-based actions] had prevented uniformity in the administration of the law of the state."[214] Thus, the argument for adopting the federal law of res judicata to insure uniformity among the federal courts in diversity suits flies directly in the face of one of the main goals of the *Erie* decision, uniformity in the administration of the law of the state.

V. Conclusion

Res judicata is a powerful doctrine whereby claims are transformed either by merging into the judgment in favor of the plaintiff or as a bar by the judgment in favor of the defendant. State laws can enlarge or modify these effects of claim preclusion. It follows that under the *Erie* doctrine, res judicata is not simply a mode or form in the litigation, but is a concept by which states create rights and obligations to and for the parties. The interests of the federal courts in determining the scope of their own judgments and preserving the integrity of their judgments are strong. Yet they are not so strong as to override the state-created rights and obligations which occur in the form of res judicata. A federal court

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[210] *Rationale of Preclusion*, *supra* note 123, at 34 (footnote omitted).

[211] 515 F. Supp. at 440.

[212] *Id.*

[213] 304 U.S. at 75. *See supra* notes 25-29 and accompanying text.

[214] 304 U.S. at 75.

sitting in diversity should not abandon the goals of the *Erie* doctrine—discouragement of forum shopping, and avoidance of inequitable administration of the laws. Thus, a federal court whose jurisdiction is based on diversity of citizenship should apply state and not federal rules of res judicata. Until the Supreme Court decides whether state or federal law applies in diversity actions, however, the federal courts will remain divided as to the issue. Action by the Supreme Court is needed to resolve the issue as quickly as is possible.

MARK G. EMERSON

Indiana Opens Public Records: But (b)(6) May Be the Exemption That Swallows the Rule

I. Introduction

Indiana's new Public Records Act presents, for the first time in Indiana, a comprehensive approach to the public's access to records.[1] Although the new statute changes several areas of public records law, the single most significant change is the redefining of "public records."[2] Prior to the new Act, Indiana's definition of "public records" was found in the 1953 Hughes Anti-Secrecy Act.[3] The definition under the Hughes Act was similar to, but perhaps more restrictive than, the common law definition.[4] With the passage of the new Public Records Act, the definition of "public records" has become much less restrictive, similar in language to the most liberal definitions nationwide.[5] This new definition

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[1]Act of Apr. 12, 1983, Pub. L. No. 19-1983, 1983 Ind. Acts 241 (codified at IND. CODE §§ 5-14-3-1 to -9 (Supp. 1984)) (all references in this Note will be to the Indiana Code rather than the statute). Indiana's first public records statute, the 1953 Hughes Anti-Secrecy Act, IND. CODE §§ 5-14-1-1 to -6 (1982) (repealed effective Jan. 1, 1984), did not provide a comprehensive approach to public records access. The narrow definition of "public records" and the relative brevity of the Hughes Act precluded full application to public records access. *Compare id.* at §§ 5-14-1-1 to -6 *with* IND. CODE §§ 5-14-3-1 to -9 (Supp. 1984).

[2]IND. CODE § 5-14-3-2 (Supp. 1984). The new law also includes an expansive definition of "public agency." *Id.* This definition is important because the disclosure rule focuses on public documents held by a public agency. While there may be some dispute as to the proper construction of the public agency definition, this Note will not discuss alternative interpretations of "public agency"; instead, this Note will focus on the interpretation of "public records."

[3]IND. CODE § 5-14-1-2 (1982) (repealed effective Jan. 1, 1984). The Hughes Anti-Secrecy Act provided for both open records and open meetings by state and local administrative agencies.

[4]*See* Gallagher v. Marion County Victim Advocate Program, Inc., 401 N.E.2d 1362, 1366 (Ind. Ct. App. 1980). "The more conservative and prevailing [common law] definition included records 'required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done.' " *Id.* at 1365 (quoting Linder v. Eckard, 261 Iowa 216, 218, 152 N.W.2d 833, 835 (1967)). The Hughes Act defined "public records" as "any writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation." IND. CODE § 5-14-1-2 (1982) (repealed effective Jan. 1, 1984). The *Gallagher* court viewed the Hughes Act definition as stricter than the common law because it omitted the language allowing disclosure of a document created in "the discharge of a duty imposed by law." 401 N.E.2d at 1366 (emphasis deleted).

[5]*See* CAL. GOV'T CODE § 6252 (West 1980 & Supp. 1981); KY. REV. STAT. ANN. § 61.870 (Bobbs-Merrill 1980); MASS. GEN. LAWS ANN. ch. 4, § 7 (West 1976 & Supp. 1983-84); N.Y. PUB. OFF. LAW § 86 (McKinney Supp. 1983-84); OR. REV. STAT. § 192.410(4) (Supp. 1983). The Kentucky statute is typical of most liberal "public records" definitions. Kentucky defines "public records" to include "all books, papers, maps,

is exhaustive and apparently encompasses any type of information in any form,[6] making disclosure the rule, rather than the exception.

This broad definition, however, and consequently the public's access to information, has been tempered by twenty-two exemptions.[7] The most far-reaching and troublesome is Indiana Code section 5-14-3-4(b)(6)

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photographs, cards, tapes, discs, recordings or other documentary materials regardless of physical form or characteristics, which are prepared, owned, used in the possession of or retained by a public agency." KY. REV. STAT. ANN. § 61.870 (Bobbs-Merrill 1980). Compare Kentucky's definition with Indiana's new definition of "public record":

> any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, or any other material, regardless of form or characteristics.

IND. CODE § 5-14-3-2 (Supp. 1984).

[6]ACADEMY IN THE PUBLIC SERVICE, MANAGING CITIZEN ACCESS TO LOCAL GOVERNMENT RECORDS 4 (Nov. 1983) (available through the Indiana University School of Public and Enivironmental Affairs, Indianapolis) [hereinafter cited as PUBLIC SERVICE]. "The proposal [was] designed to cover nearly every document that is generated by every public agency." INDIANA LEGISLATIVE SERVICES AGENCY, FINAL REPORT OF THE INTERIM STUDY COMMITTEE ON ACCESS TO PUBLIC RECORDS, REPORT TO THE GEN. ASSEMBLY OF 1983, at 3 (Nov. 1, 1982) [hereinafter cited as FINAL REPORT].

[7]Although the Indiana statute refers to records *excepted* from disclosure, the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), refers to records *exempted* from disclosure. This Note will use the terms interchangeably as the terms are synonomous. Indiana Code section 5-14-3-4 differentiates between two types of exempted records. The first type includes public records that *can not* be disclosed by the public agency, "unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery." IND. CODE § 5-14-3-4(a) (Supp. 1984). Six categories of public records fall within this absolute exemption rule:

> (1) Those declared confidential by state statute.
>
> (2) Those declared confidential by . . . a public agency under specific authority to classify public records as confidential . . . .
>
> (3) Those required to be kept confidential by federal law.
>
> (4) Records containing trade secrets.
>
> (5) Confidential financial information obtained, upon request, from a person. . . .
>
> (6) Information concerning research . . . conducted under the auspices of an institution of higher education . . . .

Id.

In addition to these absolute exemptions, there are sixteen categories of public records that fall under a discretionary exemption. *Id.* § 5-14-3-4(b). Under this section, the public agency holding the requested record is given the discretion to grant or deny the release of the requested record. Records falling under the discretionary exemptions include:

> (1) Investigatory records of law enforcement agencies. . . .
>
> (2) The work product of an attorney representing . . .
>
> (A) a public agency;
>
> (B) the state; or
>
> (C) an individual.
>
> (3) Test questions, scoring keys, and other examination data used in

(exemption (b)(6)),[8] which permits disclosure, at the discretion of the agency, of public records containing "intraagency or interagency advisory or deliberative material that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decisionmaking."[9] In reference to a similar federal provision, it has been stated that "[o]n its face, an exemption for intra-agency memoranda can encompass nearly anything an agency puts in writing."[10] Likewise, in Indiana, (b)(6) may be the exemption that will swallow the rule.

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administering a licensing examination, examination for employment, or academic examination before the examination is given or if it is to be given again.

(4) Scores of tests or license examinations if the person is identified by name and has not consented to the release of his scores.

(5) Records relating to negotiations [of specified entities].

(6) Records that contain intraagency or interagency advisory or deliberative material that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decisionmaking.

(7) Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.

(8) Personnel files of public employees, except for [certain specified information such as names, the type of employment, and formal charges against the employee].

(9) Patient medical records and charts . . . and minutes or records of hospital medical staff meetings.

(10) Administrative or technical information that would jeopardize a record-keeping or security system.

(11) Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it.

(12) Records specifically prepared for discussion, or developed during discussion in an executive session under IC 5-14-1.5-6.

(13) The work product of the legislative services agency . . . .

(14) The work product of individual members and the partisan staffs of the general assembly.

(15) The identity of a donor of a gift made to a public agency if the donor requires nondisclosure of his identity as a condition of making the gift.

(16) Library records which can be used to identify any library patron.

Id.

[8]Interview with Richard W. Cardwell, General Counsel for The Hoosier State Press Association, in Indianapolis (Dec. 20, 1983) [hereinafter cited as Cardwell Interview]. Cardwell, principal author of the new Indiana statute, believes exemptions (b)(6) and (b)(12) will account for 90% of all public records disputes at the local governmental level.

[9]IND. CODE § 5-14-3-4 (b)(6). *Compare* 5 U.S.C. § 552(b)(5) (1982) (exempting from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency").

[10]Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047, 1048-49 (1973) (footnotes omitted). The similarities between the federal Freedom of Information Act (FOIA) and the Indiana Public Records Act are striking. Both the FOIA and the Indiana Act were passed to broaden the public's access from that permitted under predecessor acts. *See* Comment, *The Freedom of Information Act: A Time for Change?*, 1983 DET. C.L. REV. 171, 172 (discussing the FOIA and its predecessor); FINAL REPORT, *supra* note 6, at 3. The approach taken by the acts is similar

Initially the agency has discretion to disclose or retain a requested memorandum.[11] The Indiana Public Records Act, however, gives circuit and superior courts the power to review agency decisions upon the filing of an action by the individual who was denied the right of inspection.[12] Thus, the new statute places Indiana courts squarely between the non-disclosing agency and the disclosure-seeking public. In light of the expansive nature of the agency memoranda exemption, the role of Indiana courts as arbiters becomes even more essential.

Recognizing the potential difficulty exemption (b)(6) presents, this Note reviews the sources of the new Indiana Act, the fundamental policies of the agency memoranda exemption,[13] and the two major limitations on the exemption. Finally, a mode of analysis for Indiana courts reviewing (b)(6) disputes is suggested. The Note does not discuss the applicability of the exemption to outside agency consultants,[14] nor does it consider the attorney-client and attorney work product privileges within the context of the agency exemption.[15]

II. The Indiana Public Records Law

A. Policy Behind the Act

The policy behind Indiana's Public Records Act parallels the policies underlying the federal Freedom of Information Act (FOIA).[16] When the

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in that both acts permit a rather broad range of access to public documents and then limit that access by enumerating a number of specific exemptions. *See* 5 U.S.C. § 552 and Ind. Code §§ 5-14-3-1 to -9. Although the exemptions are not identical, both acts contain exemptions covering interagency and intraagency memoranda, medical files, investigatory records of law enforcement agencies, and trade secrets. This list of overlapping exemptions is not exhaustive; nevertheless, it serves to illustrate the similarities in the two acts. Because of the similarities, it is probable that Indiana courts will turn to federal case law for guidance when interpreting the Indiana Act. *See, e.g.*, Gumz v. Starke County Farm Bureau Co-op. Ass'n, Inc., 271 Ind. 694, 697, 395 N.E.2d 257, 261 (1979); Yaksich v. Gastevich, 440 N.E.2d 1138, 1139 n.3 (Ind. Ct. App. 1982); Celina Mut. Ins. Co. v. Forister, 438 N.E.2d 1007, 1011 n.3 (Ind. Ct. App. 1982). This Note, therefore, relies heavily on federal case law when examining the provisions of the Indiana Act.

[11]Ind. Code § 5-14-3-4(b).

[12]*Id.* § 5-14-3-9(b).

[13]For purposes of this Note, the term agency memoranda may be deemed to include both intraagency and interagency written communications.

[14]For a discussion of the intraagency memoranda exemption as it applies to outside agency consultants, see Note, *supra* note 10, at 1063-66.

[15]Indiana Code section 5-14-3-4(b)(2) establishes a separate exemption from (b)(6) for attorneys representing the public agency. On the federal level, the attorney-client and attorney work product privileges are most often claimed within the intraagency memorandum exemption. For a discussion of these issues, see Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862-66 (D.C. Cir. 1980); Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252-55 (D.C. Cir. 1977).

[16]The FOIA is codified at 5 U.S.C. § 552 (1982).

FOIA was passed in 1966 it was believed that the Act would "promote an informed electorate, which in turn [would] further the growth of democratic principals [sic]."[17] In addition, the FOIA was intended "to increase agency responsibility by allowing increased access to governmental records."[18] These policies are largely reiterated in the Indiana Act:

> A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.[19]

In Indiana, as on the federal level, the ultimate goals of agency responsibility and popular control of government are best-served by maximum public access to governmental records. Indiana's new Public Records Act attempts to facilitate this access through its broad definition of "public records."

B. Access to Indiana Public Records: A Matter of Definition

As noted above, the most significant change resulting from the new Indiana Public Records Act is the broadening of the "public records" definition.[20] The definition of "public records" in Indiana law has taken an unusual course, from a relatively liberal one at common law,[21] to a restrictive one under the Hughes Anti-Secrecy Act,[22] and finally to a very liberal definition under the new Act.[23] The Indiana public's access to government records has varied in the same manner. According to Indiana courts, the public's access has depended upon "whether [the] particular document [for which disclosure is sought] may be categorized as 'public.' "[24] Thus, a restrictive definition of "public records" resulted in more limited access while a liberal definition produced broader access.

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[17]Comment, *supra* note 10, at 173.

[18]*Id.* at 174 (footnote omitted).

[19]IND. CODE § 5-14-3-1. It should be noted that this policy statement is substantially similar to the policy statement in the Hughes Anti-Secrecy Act. IND. CODE § 5-14-1-1 (1982) (repealed effective Jan. 1, 1984). Yet, the Hughes Act was applied in a very restrictive manner because of its public records definition. *See supra* note 4.

[20]IND. CODE § 5-14-3-2 (Supp. 1984). *See supra* note 5.

[21]Robison v. Fishback, 175 Ind. 132, 137-38, 93 N.E. 666, 668-69 (1911). *See infra* text accompanying note 29.

[22]IND. CODE § 5-14-1-2 (1982) (repealed effective Jan. 1, 1984); Gallagher v. Marion County Victim Advocate Program, 401 N.E.2d 1362, 1368 (Ind. Ct. App. 1980). *See supra* note 4.

[23]IND. CODE § 5-14-3-2. *See supra* note 5.

[24]*See* Gallagher v. Marion County Victim Advocate Program, 401 N.E.2d 1362, 1365 (Ind. Ct. App. 1980). In *Gallagher*, the court found that certain police incident reports

Although Indiana courts never officially adopted a common law definition of public records,[25] the Indiana Supreme Court in *Robison v. Fishback*,[26] decided in 1911, noted both the restrictive and liberal common law definitions of public records.[27] The restrictive definition identified a public record as "one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done."[28] The *Robison* court, however, relied on the liberal common law definition:

> "Whenever a written record of the transaction of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record . . . ."[29]

While this broad definition would have aided access to public records, the definition was never utilized for public records disclosure.[30]

Forty-two years after the *Robison* decision, Indiana passed the Hughes Anti-Secrecy Act.[31] The Hughes Act, with the stated policy of opening access to public records,[32] defined "public records" as "any writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation . . . ."[33] This definition was basically the same as the restrictive common law definition set forth in *Robison*.[34] Thus, in spite of the Act's broad disclosure policy, the overall effect was to actually decrease access to public records.

Beginning in 1953, the Indiana Attorney General issued opinions interpreting the Hughes Act which consistently recommended against public

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were not subject to disclosure as they were not required or directed to be made by any rule or regulation as required by the Hughes Act "public records" definition.

[25] *Id.* at 1371 (Chipman, J., dissenting).

[26] 175 Ind. 132, 93 N.E. 666 (1911).

[27] *Id.* at 137, 93 N.E. at 668-69. It should be noted that this case did not deal with public records disclosure; instead, it determined the property rights in certain public records.

[28] *Id.* at 137-38, 93 N.E. at 669 (citation omitted).

[29] *Id.* at 137, 93 N.E. at 668-69 (quoting Coleman v. Commonwealth, 66 Va. (25 Gratt.) 865 (1874)).

[30] *See* Gallagher v. Marion County Victim Advocate Program, 401 N.E.2d 1362, 1371 (Ind. Ct. App. 1980); *supra* note 27.

[31] Act of Mar. 9, 1983, ch. 115, 1953 Ind. Acts 420.

[32] IND. CODE § 5-14-1-1 (1982) (repealed effective Jan. 1, 1984).

[33] *Id.* § 5-14-1-2.

[34] HOOSIER STATE PRESS ASSOCIATION, ACCESS TO PUBLIC RECORDS 7 (Nov. 1983) (available from the Hoosier State Press Association, Indianapolis) [hereinafter cited as ACCESS TO PUBLIC RECORDS].

disclosure.[35] Under the Attorney General's interpretation, a writing was not a public record unless a "statute or regulation requir[ed] or direct[ed] the [writing] to be kept."[36]

In 1980, the Indiana Court of Appeals, in *Gallagher v. Marion County Victim Advocate Program*,[37] adopted a similar approach to the Hughes Act.[38] Judge Young, writing for the majority, reviewed both the restrictive and liberal common law definitions of "public records."[39] Noting that Indiana's "statutory definition clearly limits 'public records' to writings which are required to be made, expressly or by necessary inference, by statute or rule or regulation,"[40] Judge Young concluded that the definition appeared to be even stricter than the narrowest common law definition.[41] Judge Chipman, in dissent, however, noted that the Hughes Act was viewed as "an *expansion* of the common law definitions."[42] Relying in part on the Act's liberal declaration of policy[43] and its mandate of liberal construction,[44] the dissent deduced a "legislative intent to make government records freely available to the public."[45] Based on this disclosure policy and a broad reading of what constituted a rule or regulation, the dissent concluded that the documents sought were subject to

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[35]*E.g.*, 1953 Op. Att'y Gen. 524, 525 (denying access to Insurance Department files of complaints against insurance companies); 1953 Op. Att'y Gen. 94, 95-96 (restricting access to State Personnel Board records). It should be noted that Attorney General opinions are not binding on Indiana courts. Medical Licensing Bd. v. Ward, 449 N.E.2d 1129, 1138 (Ind. Ct. App. 1983).

[36]1953 Op. Att'y Gen. 524, 525.

[37]401 N.E.2d 1362 (Ind. Ct. App. 1980).

[38]*Id.* at 1368 (denying access to Indianapolis Police Department accident and incident reports).

[39]*Id.* at 1365.

[40]*Id.* at 1366.

[41]*Id.*

[42]*Id.* at 1371 (Chipman, J., dissenting) (citation omitted).

[43]IND. CODE § 5-14-1-1 (1982) (repealed effective Jan. 1, 1984).

[44]*Id.*

[45]401 N.E.2d at 1370 (Chipman, J., dissenting). The Indiana Supreme Court has long recognized that when courts construe statutes, they are to look at the act as a whole and must construe the statute to place it in "harmony with the intent the Legislature had in mind, in order that the spirit and purpose of the statute be carried out." Indiana State Highway Comm'n v. White, 259 Ind. 690, 695, 291 N.E.2d 550, 553 (1973) (citing Zoercher v. Indiana Associated Tel. Corp., 211 Ind. 447, 7 N.E.2d 282 (1936)). This view was recently reaffirmed as a basic principle when the supreme court stated

> all statutes should be read where possible to give effect to the intent of the legislature. It is well settled that the foremost objective of the rules of statutory construction is to determine and effect the true intent of legislature. It is also well settled that the legislative intent as ascertained from an Act as a whole will prevail over the strict literal meaning of any word or term used therein. When the court is called upon to construe words in a single section of a statute, it must construe them with due regard for all other sections of the act and with

disclosure.[46] Because of its emphasis on the Hughes Act's policy of disclosure, the dissenting opinion "is far more compelling than that of the majority."[47]

Nevertheless, the *Gallagher* decision served to aptly underscore the shortcomings of the Hughes Act.[48] The fundamental shortcoming of the Hughes Act, its severely restrictive definition of "public record," has been remedied by the new law.

The definition of "public records" under the new Act is one of the most liberal in the nation.[49] "Public records" in Indiana now include

> any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, or any other material, regardless of form or characteristics.[50]

> due regard for the intent of the legislature in order that the spirit and purpose of the statute be carried out.

Park 100 Dev. Co. v. Indiana Dep't of State Revenue, 429 N.E.2d 220, 222-23 (Ind. 1981) (citations omitted).

In spite of Indiana Supreme Court statements requiring courts to give effect to legislative intent, the *Gallagher* majority merely acknowledged the policy statement contained in the Hughes Act and stated:

> However, the specific grant of the right of inspection extends only to "public records" as specifically defined. The limitations on this court are clear. In the construction of statutes, we have nothing to do with questions of policy and political morals; such matters are for the consideration of the Legislature. Consideration of hardships cannot properly lead a court to broaden a statute beyond its legitimate limits. We must examine the language used by the Legislature and give effect to every word and clause if possible, since it is presumed that all language in a statute was used intentionally.

401 N.E.2d at 1364 (citations omitted). The majority then focused on the specific wording in the public records definition without giving due consideration to the Act's policy statements. The dissenting opinion, however, examined the legislative purpose of the Act and reasonably concluded that the records in question were disclosable. *Id.* at 1370-72 (Chipman, J., dissenting). In light of the supreme court's recent affirmation of the rule requiring consideration of legislative intent, Indiana courts should follow the lead of the *Gallagher* dissent and consider the policies set forth by Indiana's new Public Records Act when construing the scope of the Act.

[46]401 N.E.2d at 1369 (Chipman, J., dissenting). Judge Chipman developed a broad interpretation of what constituted a rule or regulation. By expanding this concept, he expanded the definition of public records because under the statute a public record was one required to be kept by a rule or regulation.

[47]Greenberg, *Administrative Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 65, 88 (1981).

[48]ACCESS TO PUBLIC RECORDS, *supra* note 32, at 8.

[49]*See supra* note 5 and accompanying text.

[50]IND. CODE § 5-14-3-2.

Disclosure no longer depends upon the existence of a statute or regulation requiring that the record be made. Any agency record, based on its actual existence,[51] is deemed disclosable under the broad, new definition.

C. Other Modifications Affecting Disclosure

Significant modifications are also present in two other areas of the new Act. First, the burden of proof for the nondisclosure of a public record has been specifically placed on the nondisclosing agency.[52] Although the Hughes Act did not expressly place the burden on either party,[53] as a practical matter, it fell on the individual seeking disclosure.[54] Because of the narrow definition of "public records" under the Hughes Act, the party seeking disclosure had to prove a right of inspection by pointing to a statute or regulation requiring the creation of the record.[55] Under the new Act, the agency denying disclosure has the burden to prove that the requested record falls within one of the Act's twenty-two exemptions.[56]

The second change has a less significant practical effect but will result in increased general access. The right to inspect Indiana public records has been extended from "every citizen of this state"[57] to "any person,"[58] eliminating any requirement of state citizenship before disclosure can take place.[59]

D. Development of Indiana's Agency Memoranda Exemption

Typically, liberal open records laws are limited by specific exemptions;[60] Indiana's is no exception.[61] Indiana's exemption (b)(6) for agency memoranda is not a product of a particular dispute under the Hughes Anti-Secrecy Act. The narrow definition of "public records" under the

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[51]PUBLIC SERVICE, *supra* note 6, at 4.

[52]IND. CODE § 5-14-3-1 ("[T]he burden of proof for the nondisclosure of a public record [is] on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.").

[53]*See* IND. CODE §§ 5-14-1-1 to -3, -5, -6 (1982) (repealed effective Jan. 1, 1984). Indiana Code § 5-14-1-4 was repealed in 1977.

[54]ACCESS TO PUBLIC RECORDS, *supra* note 34, at 8.

[55]*Id.*

[56]*Gallagher*, 401 N.E.2d at 1365 ("[T]he dispositive issue becomes whether a particular document comes within any of the enumerated exemptions."). For an extensive discussion of the burden of proof, see *infra* notes 179-88 and accompanying text.

[57]IND. CODE § 5-14-1-3 (1982) (repealed effective Jan. 1, 1984).

[58]IND. CODE § 5-14-3-3 (Supp. 1984).

[59]As noted earlier, the new Act also incorporates an expansive definition of "public agency." *Id.* § 5-14-3-2. *See supra* note 2.

[60]*See, e.g.*, North Dakota v. Andrus, 581 F.2d 177, 179 (8th Cir. 1978); *Gallagher*, 401 N.E.2d at 1365.

[61]*See supra* note 7 and accompanying text.

former Act,[61] requiring that the record be made "by statute or rule or regulation"[63] before disclosure was required, precluded any possibility of reaching a document as amorphous as an agency memorandum. Instead, Indiana's exemption (b)(6) for written deliberative material reflects the same privilege now enjoyed by government agencies in their oral deliberative communications.[64] This protection for the internal oral communications of public agencies is found within Indiana's Open Door Law.[65] That law, while providing for broad public access to government proceedings, does not "touch the internal staff operations of public agencies."[66] Indiana's exemption (b)(6) for written deliberative communications operates in the same vein.

The specific language of Indiana's exemption (b)(6) is not borrowed from the language of the federal statute but from cases construing the scope of federal exemption.[67] Federal exemption 5 provides for the nondisclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[68] This language indicates "that Congress has attempted to incorporate into the FOIA certain principles of civil discovery law."[69] The United States Supreme Court, in *Environmental Protection Agency v. Mink*,[70] interpreted exemption 5 as "clearly [contemplating] that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency."[71] The Court then noted that applying litigation discovery rules under exemption 5 would be difficult because of the uncertainty surrounding these rules since "the very beginnings of the Republic."[72] The Court noted that "at best, . . . discovery rules can only be applied under Exemption 5 by way of rough analogies."[73]

Indiana avoided the difficulties of applying discovery rules under exemption (b)(6) by using language from federal court decisions construing

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[62]*See supra* notes 31-48 and accompanying text.

[63]*Gallagher*, 401 N.E.2d at 1366.

[64]Cardwell Interview, *supra* note 8. Governor Robert Orr requested that the new Act provide the same confidentiality for his staff 's written deliberative communications as that for its similar oral communications. Because there is no language limiting the exemption to the Executive's immediate staff, exemption (b)(6) will apply to all government agencies.

[65]*See* IND. CODE §§ 5-14-1.5-1 to -7 (1982). Indiana's Open Door Law provides for broad access to public agency meetings. It too was a reform of the Hughes Anti-Secrecy Act. Note, *The "Open Door" Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 VAL. U.L. REV. 295, 296 (1980).

[66]Note, *supra* note 65, at 309.

[67]Cardwell Interview, *supra* note 8.

[68]5 U.S.C. § 552(b)(5).

[69]Jordan v. United States Dep't of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978).

[70]410 U.S. 73 (1973).

[71]*Id.* at 86.

[72]*Id.* (footnote omitted).

[73]*Id.*

exemption 5 rather than by using the exemption itself.[74] Leading federal decisions[75] have interpreted exemption 5 to include "*advice*, . . . *opinions*, and other material reflecting *deliberative* or policy-making processes, but not . . . factual . . . reports."[76] Indiana's exemption (b)(6) refers to agency records containing "*advisory* or *deliberative* material that are expressions of *opinion*."[77] As in the federal cases,[78] this language is designed to ensure the release of factual material found within agency memoranda while protecting the agency's ability to enjoy open, frank discussions.[79] Indiana's additional requirement that exempted communications be "for the purpose of *decisionmaking*"[80] is also derived from federal case law.[81] This provision reflects the intent to disclose final agency policy and staff instructions that affect the public,[82] material that typically arises after the decisionmaking process is complete.[83]

Several jurisdictions have adopted language almost identical to that found in federal exemption 5.[84] The drafters of Indiana's exemption (b)(6) are to be commended for avoiding the potentially confusing discovery language[85] found in the federal exemption.[86] Nevertheless, Indiana's agency memoranda exemption could have been made clearer by specific statutory language requiring the disclosure of factual data, final agency policy, and staff instructions that affect the public.[87] Instead, under the exemption's

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[74]Cardwell Interview, *supra* note 8.

[75]*See* EPA v. Mink, 410 U.S. 73 (1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

[76]Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (emphasis added) (footnote omitted).

[77]IND. CODE § 5-14-3-4(b)(6) (Supp. 1984) (emphasis added).

[78]*See supra* note 75.

[79]Cardwell Interview, *supra* note 8; ACCESS TO PUBLIC RECORDS, *supra* note 34, at 17.

[80]IND. CODE § 5-14-3-4(b)(6) (emphasis added). The legislature's use of "and" in the statute indicates that the document, to be withheld, must not only be an opinion but also must be an opinion espoused for the purpose of decisionmaking. *Id. See infra* text accompanying note 209.

[81]*See generally* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978).

[82]Cardwell Interview, *supra* note 8; ACCESS TO PUBLIC RECORDS, *supra* note 34, at 17.

[83]NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

[84]*See, e.g.*, D.C. CODE ANN. § 1-1524(a)(4) (1981); MD. ANN. CODE art. 76A, § 3(b)(v) (1957); WYO. STAT. § 16-4-203(b)(v) (Supp. 1982).

[85]*See* O'Neill, *The Freedom of Information Act and Its Internal Memoranda Exemption: Time for a Practical Approach*, 27 SW. L.J. 806, 809-10 (1973). "The courts have at times been misled by the indirect reference to discovery law in the fifth exemption into believing that balancing need against harm, common in the context of discovery law, is an appropriate course to follow in cases involving requests for documents under the Act." *Id.* (footnote omitted).

[86]5 U.S.C. § 552(b)(5). *See supra* notes 68-73 and accompanying text.

[87]At least one state statute utilizes such language. N.Y. PUB. OFF. LAW § 87 (McKinney Supp. 1983-84) provides in part:

> 2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

present language, persons seeking disclosure of these types of material will have to depend upon general rules of statutory construction[88] to ensure their right of access.[89]

III. The Agency Memoranda Exemption: Its Policies and Limitations

Due to the expansive interpretation government agencies may seek to place on the agency memoranda exemption,[90] the imprecise language of Indiana's provision,[91] and Indiana's history of restrictive public access, it is imperative that Indiana courts look to the Act's underlying policies and limitations when interpreting exemption (b)(6).[92] The exemption for agency memoranda is not a recent development; its fundamental principles substantially predate the federal Freedom of Information Act.[93] At common law, the agency memoranda exemption was encompassed within the larger doctrine of "executive privilege."[94] Although "executive privilege" has both constitutional and common law origins,[95] the agency memoranda exemption has none of the constitutional implications.[96] Instead, the common law basis of the agency memoranda exemption was

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. . . .
(g) are inter-agency or intra-agency materials which are not:
i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public, or
iii. final agency policy or determinations
. . . .

[88]*See generally* Common Council of Peru v. Peru Daily Tribune, 440 N.E.2d 726, 729 (Ind. Ct. App. 1982); Merimee v. Brumfield, 397 N.E.2d 315, 319 (Ind. Ct. App. 1979). Words specifed in a statute, by implication, exclude other words not so specified. *See infra* text accompanying note 142. For a discussion of how this rule of statutory construction relates to exemption (b)(6), see *infra* notes 141-45 and accompanying text.

[89]Ind. Code § 5-14-3-3 (Supp. 1984).

[90]*See* Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

[91]*See supra* notes 87-89 and accompanying text.

[92]*Cf.* Academy in the Public Service, *supra* note 6, at 8 ("DO remember that attitudes and practices of bureaucratic secrecy are 'out.'"). *See supra* notes 31-48 and accompanying text. For a discussion of the proper role of legislative policy in the judicial process, see *supra* note 45.

[93]*See generally* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); Kaiser Alum. & Chem. Corp. v. United States, 157 F.Supp. 939 (Ct. Cl. 1958) (discussing the executive privilege doctrine prior to the Freedom of Information Act).

[94]*Cf.* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) ("That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear.").

[95]Nixon v. Sirica, 487 F.2d 700, 763 (D.C. Cir. 1973) (Wilkey, C.J., dissenting).

[96]Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C. Cir. 1975). In reference to exemption 5 the court stated, "we mean what is usually referred to as 'executive privilege,' shorn of any constitutional overtones of separation of powers." *Id.*

rooted in the general principle that not all government business can be conducted entirely in the open.[97]

Federal exemption 5 and Indiana exemption (b)(6) are examples of the executive privilege doctrine in codified form.[98] Federal cases construing the agency memoranda exemption have consistently recognized its common law executive privilege origin.[99]

A. Policies Underlying the Agency Memoranda Exemption

The agency memoranda exemption is based on essentially three policy grounds.[100] First, and most importantly, "it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism. . . ."[101] This first policy basis is, in essence, the same as the core policy of the executive privilege at common law—frank discussion within the deliberative process.[102]

Congress was well aware of the common law executive privilege for agency opinions and recommendations when it created exemption 5 in the federal Freedom of Information Act.[103] In fact, "[a]s the legislative history makes clear, Congress' *principal purpose* in adopting Exemption 5 was to protect the confidentiality of the pre-decisional deliberative process":[104]

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl."[105]

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[97]Nixon v. Sirica, 487 F.2d 700, 764 (D.C. Cir. 1973) (Wilkey, C.J., dissenting).

[98]*Cf. id.* at 763 (Wilkey, C.J., dissenting). "[T]he common sense-common law privilege of confidentiality necessary in government administration . . . has been partly codified in statutes such as the Freedom of Information Act . . . ." *Id.*

[99]*See, e.g.*, NLRB V. Sears, Roebuck & Co., 421 U.S. 132 (1975); Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978); Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975); Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969).

[100]Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[101]*Id.*

[102]*See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979, (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

[103]EPA v. Mink, 410 U.S. 73, 86 (1973); Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

[104]Jordan v. United States Dep't of Justice, 591 F.2d 753, 773 (D.C. Cir. 1978).

[105]S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).

On the federal level, this protection for full and frank agency discussion is found within exemption 5's discovery clause protecting memoranda that a private party could not discover in litigation with an agency.[106] This clause was the vehicle used by Congress to interject the executive's traditional privilege against civil discovery of pre-decisional agency deliberations into exemption 5.[107] In Indiana, this is accomplished through the language of exemption (b)(6) which expressly protects the advisory and deliberative portions of agency memoranda.[108]

The second policy of the agency memoranda exemption is "to protect against premature disclosure of proposed policies before they have been finally formulated or adopted."[109] Congress' concern was that such premature disclosure "might impede the proper functioning of the administrative process."[110] "Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position."[111]

Congress' intent to prevent the premature disclosure of nonfinal agency opinions is stated in the House of Representatives report that led to the adoption of the FOIA:[112]

> [A] Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause [exemption 5] is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.[113]

Again, on the federal level, this protection against premature/pre-decisional disclosure is found within exemption 5's discovery clause.[114] In Indiana, the same policy goal is accomplished by exempting memoranda "that are communicated for the purpose of decisionmaking."[115]

The final policy ground for the agency memoranda exemption purports to "protect against confusing the issues and misleading the public

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[106]5 U.S.C. § 552(b)(5).

[107]*See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-49 (1975). For a discussion of the difficulties in applying discovery law to exemption 5, see *supra* notes 71-74 and accompanying text.

[108]IND. CODE § 5-14-3-4(b)(6).

[109]Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[110]S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965).

[111]Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Implicit within this policy is the rule that final agency opinions remain open to disclosure. *See infra* notes 147-57 and accompanying text.

[112]H.R. REP. No. 1497, 89th Cong., 2nd Sess. 1, 10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2427-28.

[113]*Id.* at 10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS, 2418, 2427-28.

[114]*See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[115]IND. CODE § 5-14-3-4(b)(6).

by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action."[116] This policy appears not to have arisen from Congress,[117] but from the federal courts.[118] Although the United States Supreme Court has used similar language,[119] it is important to note that the District of Columbia Court of Appeals, which apparently originated this policy ground,[120] did not base its decision on this ground.[121] Instead, the court harkened back to the first ground, full and frank agency discussion.

Unlike the exemption's first policy ground protecting the agency's full and frank discussions, and the second policy ground preventing the premature disclosure of proposed policies, this third policy ground claims to protect the public itself from being misled and to guard against confusing the issues.[122] This philosophy of protecting the disclosure-seeking public from itself is not in tune with the stated policy of public records disclosure: "A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master."[123] To the contrary, the third policy ground allows government agencies and the courts to deny access on the premise of protecting the unwitting public from possible confusion.[124]

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[116]Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (citation omitted).

[117]*See* Note, *supra* note 10, at 1049. "This exemption . . . is based on two specific policy considerations which should define its scope: (1) preventing permature disclosure . . . and (2) eliminating the inhibition of a free and frank exchange . . . ." *Id.* The Note refers to the House and Senate reports as the sources of these two grounds. No reference is made to a third policy ground. *Id.*

[118]*Cf.* Jordan v. United States Dep't of Justice, 591 F.2d 753, 773 (D.C. Cir. 1978). The *Jordan* court cites Sterling Drug Inc. v. FTC, 450 F.2d 698, 706-08 (D.C. Cir. 1971) as the older of two sources of this third policy ground. The absence of this policy ground from the House and Senate reports, *see supra* note 113, indicates a judicial source.

[119]*See* Renegotiation Board v. Grumman Aircraft, 421 U.S. 168, 186 (1974). "[R]elease of the Regional Board's reports on the theory that they express the reasons for the Board's decision would, in those cases in which the Board had other reasons for its decision, be affirmatively misleading." *Id.* (citations omitted); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 152 (1975). "The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground." *Id.*

[120]*See supra* notes 117-18 and accompanying text.

[121]"The possible inaccuracies and omissions in these memoranda are not, however, the most important consideration affecting our conclusion that they need not be disclosed. We are primarily motivated by our belief that there is a great need to preserve the free flow of ideas." Sterling Drug Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971).

[122]*See* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[123]IND. CODE § 5-14-3-1.

[124]*Cf.* Grumman Aircraft Eng. Corp. v. Renegotiation Board, 482 F.2d 710, 718 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975) (stating that "the public might be misled by exposure to discussions occurring before policy affecting it were actually determined").

Noting that an agency might seek to avoid disclosure on the claim that a final decision was never reached, the District of Columbia Court of Appeals, in *Vaughn v. Rosen*,[125] presented a much more persuasive analysis: "The public has an interest in decisions deferred, avoided, or simply not taken for whatever reason, equal to its interest in decisions made, which from their very nature may more easily come to public attention than those never made."[126] The reasoning of the *Vaughn* decision best serves Indiana's new liberal policy of public disclosure[127] as well as the ultimate goal of public records disclosure—"an informed, intelligent electorate."[128] Because this approach promotes, rather than discourages, a well informed public, Indiana courts should encourage disclosure where possible, and not prohibit disclosure where the fear is merely that the public may be misled.

The policies of protecting open, frank agency discussions and preventing the premature disclosure of nonfinal agency opinions provide ample protection to the agency's deliberative process. The policy of protecting the public from being misled, on the other hand, could go too far in protecting the agency. In the final analysis, liberal records disclosure[129] and the public's broad interest in agency decisions[130] militates against the application of this third, questionable policy ground.

B. Limitations on the Agency Memoranda Exemption

Indiana's exemption (b)(6) is designed to place the same limits on nondisclosure as those found under federal exemption 5.[131] Because of the similarity in goals, Indiana courts will find federal case law helpful in interpreting the scope of Indiana's Act. Under federal case law, full and frank agency discussion is protected as is prevention of premature disclosure.[132] Yet, in applying these policies, the courts have consistently required the disclosure of factual material[133] and final agency opinions.[134] These two areas have evolved as the main limitations on the agency memoranda exemption,[135] and will probably evolve as the major limitations on the Indiana exemption as well.[136]

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[125]523 F.2d 1136 (D.C. Cir. 1975).

[126]*Id.* at 1146.

[127]IND. CODE § 5-14-3-1.

[128]H.R. REP. NO. 1497, 89th Cong., 2nd Sess. 12, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2429.

[129]*See* IND. CODE § 5-14-3-1.

[130]*See Vaughn*, 523 F.2d at 1146.

[131]Cardwell Interview, *supra* note 8; ACCESS TO PUBLIC RECORDS, *supra* note 34, at 17. For a discussion of why federal law is useful as a guideline, see *supra* note 10.

[132]*See supra* note 101-07, 109-14 and accompanying text.

[133]*See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973).

[134]*See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[135]*See generally* Note, *supra* note 10, at 1049-63.

[136]The policies and goals of the FOIA and the Indiana Public Records Act are very similar. Federal case law, therefore, provides a useful guide. *See supra* note 10.

1. Disclosure of Factual Material.—The factual portions of agency memoranda were available for disclosure at common law;[137] the clear distinction between nondisclosable opinions and disclosable facts was also recognized.[138] The United States Supreme Court, in *Environmental Protection Agency v. Mink*,[139] specifically noted the fact-opinion dichotomy: "Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policymaking processes on the one hand, and purely factual, investigative matters on the other."[140] The language of Indiana's exemption (b)(6) establishes the fact-opinion dichotomy by implication.[141]

Disclosure of factual material, in Indiana, rests upon statutory interpretation: "When certain items or words are specified or enumerated in [a] statute, then, by implication, other items or words not so specified are excluded."[142] Hence, exemption (b)(6)'s reference to the nondisclosure of "advisory or deliberative material . . . expressions of opinion or . . . speculative"[143] matters reserves factual material as open for disclosure.[144] The federal judiciary has applied a similar construction of exemption 5: "[C]ommunications not consisting of advice and opinions—such as those containing purely factual material—are not 'intra-agency memorandums' in the sense that Congress used that term and so are not exempt from disclosure."[145] Thus, factual material contained in a document should be disclosed in Indiana, even when the document as a whole is not subject to disclosure.[146]

2. Disclosure of Final Agency Opinions.—Courts have stated that final agency opinions must be disclosed[147] "even though the information is admittedly recommendatory and subjective."[148] The United States Supreme Court, in *NLRB v. Sears, Roebuck & Co.*,[149] set out the policy behind requiring such disclosures: "[T]he public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency . . . ."[150]

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[137]*See* Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)("The objective facts . . . are otherwise available.").

[138]*See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

[139]410 U.S. 73 (1973).

[140]*Id.* at 89 (footnote omitted).

[141]*See* IND. CODE § 5-14-3-4(b)(6); Cardwell Interview, *supra* note 8.

[142]Common Council of Peru v. Peru Daily Tribune, Inc., 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (citation omitted).

[143]IND. CODE § 5-14-3-4(b)(6).

[144]Cardwell Interview, *supra* note 8.

[145]Note, *supra* note 10, at 1049-50 (footnotes omitted).

[146]*See infra* notes 198-201 and accompanying text.

[147]*See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[148]Note, *supra* note 10, at 1058.

[149]421 U.S. 132 (1975).

[150]*Id.* at 152-53.

The District of Columbia Court of Appeals, in *Sterling Drug Inc. v. FTC*,[151] noted that the fundamental "policy of promoting the free flow of ideas . . . does not apply"[152] where final agency opinions are involved:

> [P]rivate transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it.[153]

On the federal level, the FOIA affirmatively provides for the release of agency "final opinions," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public."[154] There is no such provision in the Indiana law. Instead, in Indiana, the clause requiring that the communication be made "for the purpose of decisionmaking"[155] is intended to spawn the release of an agency's working law.[156] Once a final decision has been reached, its communication within the agency is no longer "for the purpose of decisionmaking" and the quality of the deliberative process is no longer endangered, "as long as prior communications and the ingredients of the decisionmaking process are not disclosed."[157] Although it would have been preferable for the Indiana Act to expressly provide for the release of final agency opinions,[158] the final clause requiring the purpose of decisionsmaking, if interpreted liberally to promote disclosure, will result in the release of final agency opinions and staff instructions affecting the public.

IV. Indiana's Exemption (b)(6): A Practical Approach

Indiana courts do not rule upon public records disputes until relatively late in the overall process. The process begins when an individual requesting disclosure identifies "with reasonable particularity the record being requested."[159] Following this request, if the public agency permits disclosure no dispute is raised. However, when the public agency denies disclosure,[160]

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[151]450 F.2d 698 (D.C. Cir. 1971).

[152]*Id.* at 708.

[153]*Id.* (citation omitted).

[154]5 U.S.C. § 552(a)(2)(A), (B), (C).

[155]Ind. Code § 5-14-3-4(b)(6). *See supra* note 80.

[156]Cardwell Interview, *supra* note 8.

[157]*Sears*, 421 U.S. at 151.

[158]*See supra* notes 87-89 and accompanying text.

[159]Ind. Code § 5-14-3-3(a).

[160]*Id.* § 5-14-3-9 providing in part:

(a) A denial of disclosure by a public agency occurs when:

the requesting individual may file an action to compel disclosure "in the circuit or superior court of the county in which the denial occurred."[161] At this stage, the courts will be asked to determine whether disclosure or nondisclosure of the particular record is mandated.[162] The courts have not yet had an opportunity to rule under the new Act.[163] However, when those rulings become necessary, the courts are instructed to follow a number of procedures and give consideration to a number of policies. The court procedures discussed in this Note are derived from the entire Act and thus apply to all public records disputes.[164] The policies discussed focus only on exemption (b)(6) and the considerations it will likely raise.[165] In combination, these court procedures and exemption (b)(6) policy considerations provide a thorough analysis for cases arising under exemption (b)(6).

A. Procedural Devices Under the Indiana Public Records Act

Public records disputes do not, in general, fit squarely within the traditional adversarial system.[166] While one party has total knowledge of the disputed record's contents, the opposing party has little, if any, such knowledge.[167] In this context, the importance of the proper application of court procedures becomes apparent. First, the all-inclusive definition of "public records" in the new statute[168] precludes any need to decide whether or not the record was required to be made by statute, rule, or regulation.[169] Instead, almost all documents within the possession of a public agency are presumed to be "public records,"[170] and the court must

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> (1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or
> (2) twenty-four (24) hours after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made;
>
> whichever occurs first.

[161] *Id.* § 5-14-3-9(b). Although generally administrative remedies must be exhausted before a party seeks judicial review, *see Evans v. Stanton*, 419 N.E.2d 353, 355 (Ind. Ct. App. 1981), the Indiana Public Records Act institutes its own procedures for judicial review. IND. CODE § 5-14-3-9.

[162] IND. CODE § 5-14-3-9(b), (c).

[163] *Id.* §§ 5-14-3-1 to -9.

[164] *See infra* text accompanying notes 168-201. The new Act provides for both mandatory court procedures ("The court shall determine the matter de novo . . . ." IND. CODE § 5-14-3-9(c)), and discretionary court procedures ("The court may review the public record in camera . . . .") *Id.*

[165] *See infra* text accompanying notes 202-24.

[166] *See* Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973).

[167] *Id.* at 823.

[168] IND. CODE § 5-14-3-2 (Supp. 1984). *See supra* text accompanying notes 49-51.

[169] *See* IND. CODE § 5-14-1-2 (1982) (repealed effective Jan. 1, 1984).

[170] *See* FINAL REPORT, *supra* note 6, at 3.

decide if the document falls under one of the twenty-two exemptions.[171] As the court stated in *Gallagher v. Marion County Victim Advocate Program, Inc.*,[172] "the dispositive issue [is] whether [the] particular document comes within any of the enumerated exemptions."[173]

Second, in determining whether the document is exempted, the court must construe the exemptions narrowly. Although the new Act does not specifically require that its exemptions be narrowly construed, it does require liberal construction to implement the broad policy of disclosure.[174] In addition, Indiana courts have recognized the general rule that exceptions to a statute are to be strictly construed,[175] particularly with respect to public disclosure laws.[176] The federal judiciary has consistently recognized this rule when considering the agency memoranda exemption:[177] "The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly."[178]

Third, Indiana places the burden of proof on the nondisclosing agency in emphatic terms: "[T]he burden of proof for the nondisclosure of a public record [is] on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record."[179] Further, the General Assembly reiterated the burden requirement within the section setting forth court-compelled disclosure: "[T]he burden of proof [is] on the public agency to sustain its denial."[180] Although the Indiana statute does not specify the weight of this burden,[181] its practical application is significant.

Placing the burden of proof on the nondisclosing agency is of particular importance in the realm of public records disputes:

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[171] *See* IND. CODE § 5-14-3-4.

[172] 401 N.E.2d 1362 (Ind. Ct. App. 1980).

[173] *Id.* at 1365 (citation omitted).

[174] IND. CODE § 5-14-3-1.

[175] *E.g.*, Merimee v. Brumfield, 397 N.E.2d 315 (Ind. Ct. App. 1979).

[176] *See* Common Council of Peru v. Peru Daily Tribune, Inc., 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) ("Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions.").

[177] *See* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); Jordan v. United States Dep't of Justice, 591 F.2d 753, 756 (D.C. Cir. 1978); Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975).

[178] Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

[179] IND. CODE § 5-14-3-1.

[180] *Id.* § 5-14-3-9(c).

[181] *See id.* §§ 5-14-3-1, -9. The Indiana Act does not indicate whether a balancing, clear and convincing, or reasonable doubt standard should be applied. For state statutes requiring the public agency to prove that nondisclosure "clearly outweighs" the public's interest in disclosure, see CONN. GEN. STAT. ANN. § 1-19(b)(1) (West Supp. 1983); MICH. COMP. LAWS ANN. sec. 15.243, § 13(1)(n) (West 1981); OR. REV. STAT. § 192.500(2)(a) (Supp. 1983).

> [T]he party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously, the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. . . .
>
> In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information . . . . The best [the party seeking disclosure] can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain [solely nondisclosable] information.
>
> . . . .
>
> This lack of knowledge by the party seeing [sic] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution.[182]

This fundamentally unequal relationship points up the need to impose the burden of proof on the agency. Otherwise, the agency will simply claim an exemption, often an expansive one,[183] and effectively shift the burden to the "comparatively helpless" party seeking disclosure.[184] In Indiana, the agency meets its burden of proof for nondisclosure by proving that the record falls within one of the statute's discretionary exemptions.[185] In order to prevent an Indiana agency from claiming broad exemptions in an attempt to shift its burden, the court should require the agency to claim a specific exemption and to provide a relatively detailed affidavit or oral statement explaining how the particular exemption applies to the document sought.[186] The affidavit/oral statement requirement is useful for three reasons: it reflects the high statutory burden placed on the nondisclosing agency;[187] it aids the court in addressing the issues involved; and, most importantly, it reduces the agency's incentive to claim broad, nonapplicable exemptions.[188]

The fourth procedural device, de novo review, is closely related to the placement of the burden of proof. Indiana's de novo review

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[182]Vaughn v. Rosen, 484 F.2d 820, 823-24 (D.C. Cir. 1973). The reader should distinguish this decision from *Vaughn v. Rosen* reported at 523 F.2d 1136 which arose from a remand of the earlier *Vaughn* decision.

[183]*See, e.g.*, Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973) ("Thus, as a tactical matter, it is conceivable that any agency could gain an advantage by claiming overbroad exemptions.").

[184]*Id.* at 825-26.

[185]IND. CODE § 5-14-3-9(c).

[186]*See* Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973).

[187]IND. CODE §§ 5-14-3-1, -9.

[188]*See, e.g.*, Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973).

provision[189] requires that the judge consider the disclosure dispute anew, without any special consideration provided to the nondisclosing public agency. Thus, the usual deference given to administrative determinations is rejected[190] and "the agency's opinions carry no more weight than those of any other litigant in an adversarial contest before a court."[191]

Fifth, Indiana courts "may review the public record in camera to determine whether any part of it may be withheld under this chapter."[192] As a practical matter, in camera inspection will allow the judge to review the disputed record in private so as to determine whether it should be disclosed, partially disclosed, or completely withheld.

The courts should use in camera inspection "to determine whether the Government has properly characterized the information as exempt."[193] Such an inspection partially compensates for the advantage held by the agency over the party seeking disclosure.[194] Although in camera inspection is not required by the Indiana statute,[195] it should be liberally used where the records sought are not extensive.[196] In light of the adversarial advantage enjoyed by nondisclosing agencies,[197] the use of in camera inspection should not be neglected.

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[189]IND. CODE § 5-14-3-9(c).

[190]*Cf.* Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (referring to the FOIA).

[191]Mead Data Central Inc. v. United States Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977).

[192]IND. CODE § 5-14-3-9(c).

[193]Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973). While the decision in *Vaughn* does not expressly state that in camera inspection should be used, it does indicate the usefulness of such a procedure. In *Vaughn*, the court noted the difficulties in utilizing such a procedure:

> [T]he trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

Id. at 825.

After noting the difficulties inherent in in camera inspections, the court approved such inspections indicating that the agency could be required to index the requested documents, thus aiding the court's review of the document. *Id.* at 826-28. Such an indexing system could be utilized in Indiana as well. The court could require that indexes of requested documents accompany the agency's affidavit which is offered to prove that the document falls under an enumerated exemption. *See supra* notes 186-88. Those indexes would direct the court to specific portions of the document which support the agency's claimed exemption. *See Vaughn*, 484 F.2d at 826-28.

[194]Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973).

[195]*See* IND. CODE § 5-14-3-9(c).

[196]Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973).

[197]*See supra* notes 182-84 and accompanying text.

Sixth, the new Indiana Act requires public agencies to separate nondisclosable information from disclosable information and to provide for public access to the latter.[198] Likewise, this duty should be enforced by the judiciary. The United States Supreme Court has recognized the value of severing documents between portions privileged and nonprivileged.[199] The recognized rule is that "an entire document is not exempt merely because an isolated portion need not be disclosed."[200] Indiana's partial disclosure provision is closely related to exemption (b)(6).[201] Under exemption (b)(6), partial disclosure will permit agencies to withhold deliberative material that expresses opinions or is speculative, and is communicated for the purpose of decisionmaking, but will require those agencies to release the factual data, staff instructions affecting the public, and final agency opinions found within the same document. In camera inspection is the vehicle Indiana courts should rely on to institute partial document disclosure. The procedural devices provided in the statute are essential to the proper application of exemption (b)(6).

B. Specific Considerations Under Exemption (b)(6)

Utilizing the above procedures, Indiana courts, ruling on exemption (b)(6) claims, must decide whether the requested material is factual data or a final agency opinion subject to disclosure, or a properly withheld exempt document. These two areas of disclosable information set the final framework for a decision under exemption (b)(6).

1. Factual Material: Practical Considerations.—Recognizing that exemption (b)(6) compels the disclosure of factual data found in an agency memorandum,[202] the courts should, as a rule, extract all factual material and provide access to it.[203] However, there is one narrow limitation on the disclosure of factual material: "Factual information may be protected only if it is inextricably intertwined with policy-making processes."[204] To withhold factual information, it must be shown that its release would "so expose the deliberative process within an agency"[205] as to inhibit the free and frank exchange of ideas, a very high standard. Typically, extraction of the factual matter from an agency memorandum will not expose an

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[198]IND. CODE § 5-14-3-6.

[199]*See* EPA v. Mink, 410 U.S. at 91.

[200]Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973) (footnote omitted).

[201]ACCESS TO PUBLIC RECORDS, *supra* note 34, at 17.

[202]*See supra* notes 137-45 and accompanying text.

[203]*Cf.* IND. CODE § 5-14-3-6 (partially disclosable records).

[204]Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (footnote omitted). Sensitive facts, in Indiana, will likely be exempted as confidential records under exemption (a)(1). *See* IND. CODE § 5-14-3-4(a)(1).

[205]Mead Data Central Inc. v. United States Dep't of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

author's opinions or recommendations. Thus, protection for the factual portion of an agency memorandum should only rarely be granted.

2. Final Agency Opinions: Practical Considerations.—The analysis regarding the release of final agency opinions is a complicated one. As noted by the United States Supreme Court, the line between a non-disclosable agency opinion and a disclosable final agency opinion "may not always be a bright one."[206]

As outlined by the District of Columbia Court of Appeals, two requirements must be met before a record can be withheld under the agency opinion prong of the agency memoranda exemption.[207] "First, the document must be '*pre*-decisional.'"[208] Second, "the communication must be 'deliberative', that is, it must actually be related to the process by which policies are formulated."[209] The first requirement, "pre-decisional," is time-based. To be exempt, a communication must be "actually *antecedent to the adoption of an agency policy*. Communications that occur *after* a policy has already been settled upon . . . *are not* privileged."[210] Thus, staff instructions that affect the public, by their very nature, connote an already-existing policy and must be released as the decisionmaking is complete and only policy implementation remains.

"However, timing alone does not determine whether a specified document is protected by the privilege."[211]

> [T]he document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take—of the deliberative process—by which the decision itself is made.[212]

Indiana courts should examine the give-and-take of the deliberative process in a four-part, fact-sensitive analysis. First, if the document is "weighing the pros and cons of agency adoption of one viewpoint or another,"[213] discussing "the wisdom or merits of a particular agency policy, or recommend[ing] new agency policy,"[214] it is most likely exempt.

Second, if the memorandum reflects the personal opinions and subjective thoughts of the writer,[215] and is "so candid . . . that public

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[206] *Sears*, 421 U.S. at 152 n.19.

[207] Jordan v. United States Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978).

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.* (quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

[213] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[214] *Id.* at 869.

[215] *See id.* at 866, 869.

disclosure is likely in the future to stifle honest and frank communication within the agency,"[216] it should generally be withheld. Public ridicule or criticism of pre-decisional opinions can do great damage to the deliberative process.[217]

Third, a document that has "been widely distributed throughout the agency"[218] is more likely a final agency opinion or policy directive, often containing staff instructions that affect the public. Narrow distribution tends to indicate the document's lack of finality by implying that the document is not yet ready for agency-wide use. Thus, the distribution pattern of a document is indicative of its finality.

The fourth consideration has been termed "crucial" by the United States Supreme Court in one agency memoranda decision.[219] This consideration requires courts to determine what role the particular document plays in the particular agency's administrative process.[220] The "flow of advisory material"[221] is central to this consideration. For example, if the document "flow[s] from a superior with policy-making authority to a subordinate who carries out the policy"[222] it is more likely the agency's working law and should be disclosed. In contrast, "a document from a subordinate to a superior official is more likely to be predecisional. . . ."[223] "The important criterion is whether those who consult the opinions have discretion to follow the opinions or not, based on their persuasive value rather than their character as working law . . . ."[224]

Various elements of this framework will prove useful depending upon the character of the information sought, whether factual data or final agency opinions. The most important elements, however, in an exemption (b)(6) analysis remain those general procedural devices affirmatively provided by the legislature and the more narrow policies of factual and final agency opinion disclosure.

V. Conclusion

The Indiana General Assembly has taken a bold step forward with the new Public Records Act. Public disclosure is now the rule; agency secrecy is the exception. Records in any form, containing any information, are assumed open for public inspection, limited only by specific exemptions.

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[216] *Id.* at 866.

[217] *Id.* at 869.

[218] Pies v. United States Internal Revenue Servs., 668 F.2d 1350, 1352 (D.C. Cir. 1981).

[219] *Sears*, 421 U.S. at 138.

[220] *See* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980).

[221] Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980).

[222] *Id.* (footnote omitted).

[223] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980).

[224] Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980).

Although exemption (b)(6) presents public agencies with language fertile for overbroad application and record-restricting misuse, the state courts have the power and the duty to make the definitive determinations. Burden of proof requirements, de novo review, in camera inspection, and partial record disclosure combine as potent tools to ensure proper disclosure within exemption (b)(6). Applied with an eye toward the release of factual data and final agency opinions, the interrelationship of broad, liberal disclosure and protected agency deliberations has a sturdy potential for success.

The importance of this interrelationship is well-stated in the words of James Madison: " 'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.' "[225]

ERIC J. GRANINGER

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[225]EPA v. Mink, 410 U.S. at 110-11 (Douglas, J., dissenting) (quoting Letter from James Madison to W. T. Barry (Aug. 4, 1822), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910)).

The Alien's Burden of Proof Under Section 243(h): How Clear is Clear Probability?

I. Introduction

In recent years, the immigration laws of the United States have come under severe criticism from humanitarians and nationalists alike. Much of this criticism revolves around a long standing United States policy to withhold deportation of an alien to a country in which that person's life or freedom might be threatened. This policy forms the basis for section 243(h) of the Immigration and Nationality Act of 1952.[1] Recently, the United States Supreme Court interpreted this section as requiring an alien to establish that it is more likely than not that he will be the subject of persecution upon deportation in order for relief to be granted.[2]

Since the beginning of this country's existence, immigrants have built and shaped the nation's character. Aliens have flocked to the United States for a variety of reasons, such as political or economic oppression in their homeland, or to attain a better standard of living through employment and educational opportunities. Beliefs in human rights and freedom have always kept the doors ajar to those seeking a better life.[3] Conflicting with these humanitarian principles, however, are a number of concerns including anxiety about unemployment,[4] and fears that the large influx of aliens

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[1]Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1525 (1982)) [hereinafter cited as INA].

[2]Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[3]In the past, however, there have been some limitations on immigration such as head taxes; laws providing for the exclusion of lunatics, idiots, and convicts; literacy requirements and so on. *See* National Lawyers Guild, Immigration Law and Defense §§ 2.2-2.3 (rev. 2d ed. 1980).

[4]An examination of United States immigration law over the years reveals a variety of concerns, such as the number of aliens allowed in the country at any one time and the social and political backgrounds of the aliens. These are just some of the concerns which have provided the impetus for change in immigration laws.

The economy has always been a primary concern. As a cabinet-level advisory panel noted: "[M]igration in times of prosperity tends to be viewed as a handmaiden of economic growth but it becomes transformed into a threat in times of economic downturn." *Id.* § 2.5, at 2-8 (quoting Domestic Council Committee on Illegal Aliens, Preliminary Report 2 (1976)). This panel pointed out that, in the long run, an increase in the the number of illegal aliens would not increase unemployment. Moreover, illegal aliens contributed much more in taxes than they took from social services. *See* National Lawyers Guild, § 2.7, at 2-11 (citing Domestic Council Committee on Illegal Aliens, Preliminary Report 40, 155, 159 (1976)). Commentators have criticized this economic concern noting that because aliens are consumers as well as laborers, they actually stimulate the economy: "Like citizens, they create jobs at the same time they fill them." National Lawyers Guild § 2.9, at 2-14. *See also* Watson, *The Simpson-Mazzoli Bill: An Analysis of Selected Economic Policies*, 20 San Diego L. Rev. 97, 104 (1982); *Tattered Borders,* The New Republic 9, 11 (July 11, 1983).

will endanger this country's identity as one nation undivided, eventually resulting in political instability.[5] The last one hundred years, therefore, reveals an often-changing attitude towards aliens, which at times has resulted in inconsistent application of the laws.[6]

Over the years, Congress has faced the difficult task of striking a balance between the often-conflicting policies of humanitarianism and protectionism.[7] Section 243(h) of the Immigration and Nationality Act of 1952[8] exemplifies Congress' attempt to balance these policies. Realizing the grave consequences of returning an alien to a country where he might be subject to persecution, Congress has attempted to codify the nation's humanitarian concerns and protect any alien from such a fate. Thus, if an alien fears persecution in a particular country, he may seek a withholding of deportation to that country under section 243(h). At the same time, however, the laws require that the alien's fear be a valid one before relief can be granted,[9] assuring that no alien can avoid depor-

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[5]*Tattered Borders*, *supra* note 4, at 9. *See also* Simpson, *Immigration Reform and Control*, 34 LAB. L.J. 195, 195-96 (1983). In his article, Senator Simpson warned that "uncontrolled immigration is one of the greatest threats to the future of this country." *Id.* at 195. The senator explained:

> Although job market and population impacts are of great significance, I think most would agree that the national interest of the American people also includes certain even more important and fundamental aspects, such as preservation of freedom, personal safety, and political stability, as well as the political institutions which are their foundation.

Id. at 196.

[6]*See* NATIONAL LAWYERS GUILD, *supra* note 3, § 2.5, at 2-7. For an excellent summary of the history of immigration law in the United States see *id.* §§ 2.1-2.9. The author points out that although immigrants have contributed much to the formation of this country, "the attitude [of U.S. citizens] toward new arrivals remains one of fear." *Id.* § 2.1, at 2-1.

[7]*See* Watson, *supra* note 4, at 98-99. The author states:

> It is the *obligation* of our legislators to assess, and then fairly balance, the needs of various individuals and groups, and then to fashion laws that neither give excessive weight to one group nor dismiss the concerns of another with trite solutions that are no more appropriate or capable of providing a proper solution today than they were when they were first introduced.

Id. (emphasis added).

[8]INA, *supra* note 1, at 8 U.S.C. § 1253(h).

[9]*See, e.g.*, 8 C.F.R. § 208.5 (1984). This regulation states:

> The burden is on the . . . applicant to establish that he/she is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of [that] country . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id.

This requirement can also be found in the INA's definition of a refugee as one who has a "well-founded fear of persecution on account of race, religion, [etc.] . . . ." INA, *supra* note 1, at 8 U.S.C. § 1101(a)(42).

tation by simply claiming a fear of persecution.[10] In response to changing world situtations and the need for more certainty in this area, Congress has revised the language and the nature of relief found in this section many times.[11] Nevertheless, uncertainties remain concerning what an alien must prove to show a valid fear of persecution.

Until 1980, the Immigration and Nationality Act allowed the Attorney General to withhold deportation of any alien within the United States, who, in his opinion, would be subject to persecution on account of the alien's race, religion or political opinion.[12] The Refugee Act of 1980[13] amended section 243(h) to eliminate the discretionary nature of this provision, requiring the Attorney General to withhold deportation upon a finding that the alien's life or freedom would be threatened upon deportation.[14] Whether these changes truly lessen the burdens of those rightfully seeking section 243(h) relief has been, until recently, a source of conflict among the federal courts of the United States.

Prior to 1980, an alien was required to prove a "clear probability" that he would be singled out for persecution upon return to the designated

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[10]This concern was clearly stated by the Ninth Circuit Court of Appeals in Martinez-Romero v. Immigration and Naturalization Serv., 692 F.2d 595 (9th Cir. 1982):

> If we were to agree . . . that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely. There must be some special circumstances present before relief can be granted.

Id. at 595-96.

[11]For discussions of the changes section 243(h) has undergone, see 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.16b (rev. ed. 1984) [hereinafter cited as GORDON & ROSENFIELD]; Note, *Political Asylum for the Haitians?*, 14 CASE W. RES. J. INT'L L. 155, 157-58 (1982) [hereinafter cited as Note, *Political Asylum*]; Note, *Persecution Abroad as Grounds for Withholding Deportation: The Standard of Proof and the Role of the Courts*, 6 FORDHAM INT'L L.J. 100, 100 n.1 (1982) [hereinafter cited as Note, *Persecution Abroad*]; Note, *Coriolan v. Immigration and Naturalization Service: A Closer Look at Immigration Law and the Political Refugee*, 6 SYRACUSE J. INT'L L. & COM. 133, 153-55 (1978) [hereinafter cited as Note, *A Closer Look*].

[12]INA, *supra* note 1, § 243(h) (codified as amended at 8 U.S.C. § 1253(h) (1976) (current version at 8 U.S.C. § 1253 (h)(1982)). Prior to 1980, section 243(h) provided:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Id.

[13]Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C. (1982)) [hereinafter cited as Refugee Act of 1980].

[14]As amended by the Refugee Act of 1980 section 243(h) now provides:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. at 8 U.S.C. § 1253(h)(1982).

country to qualify for relief under section 243(h).[15] However, in 1982, the Second Circuit Court of Appeals in *Stevic v. Sava*[16] determined that in light of the adoption of seemingly broader language in the 1980 amendment, the "clear probability" test was no longer the correct legal standard.[17] Noting that the "clear probability" test was the method used by the Immigration and Naturalization Service (INS) to give effect to the discretionary nature of section 243(h) relief, the *Stevic* court concluded that "deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution."[18]

Other circuit courts disagreed,[19] finding that the Refugee Act of 1980 was nothing more than "cosmetic surgery,"[20] and thus the alien was still required to show a "clear probability" of persecution.[21] These decisions exemplify the uncertainty surrounding application of section 243(h) relief, and emphasize the need for direction from Congress.

The Second Circuit's decision that an alien's burden of proof is something less than clear probability was reversed by the United States Supreme Court in *Immigration and Naturalization Service v. Stevic*.[22] The Supreme Court held that an alien must establish a "clear probability of persecution" in order to avoid deportation under section 243(h).[23] The Court determined that the 1980 amendment did little to change the previously employed standard of clear probability and concluded that an alien must establish it is more likely than not that he will be subject to persecution if he is deported.[24]

It remains to be seen whether the language of the Supreme Court will provide the flexibility required by the nation's often-changing policies

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[15]*E.g.*, Martineau v. Immigration and Naturalization Serv. (INS), 556 F.2d 306, 307 (5th Cir. 1977); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir. 1976); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971); Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); Lena v. INS, 379 F.2d 536 (7th Cir. 1967).

[16]678 F.2d 401 (2d Cir. 1982), *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[17]678 F.2d at 409, *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). *Accord* Reyes v. INS, 693 F.2d 597, 600 (6th Cir. 1982) (holding that the amended language requires a showing less than "clear probability").

[18]678 F.2d at 409, *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[19]Only six months later the Third Circuit Court of Appeals reached a very different conclusion in Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982). This court rejected the *Stevic* court's conclusion and upheld the clear probability test for section 243(h) claims. The *Rejaie* court found that the legislative history of the Refugee Act of 1980 pointed "in one direction only," and held the alien was required to show a clear probability of persecution. *Id.* at 146. *Accord* Marroquin v. Manriquez, 699 F.2d 129 (3d Cir. 1983).

[20]Rejaie v. INS, 691 F.2d at 146 (3d Cir. 1982).

[21]*Id.*

[22]52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973), *rev'g* Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982).

[23]52 U.S.L.W. at 4725.

[24]*Id.* at 4730.

as well as the predictability and guidance necessary to provide aid and counsel to the thousands of aliens who enter this country each year. The Court made several observations regarding past applications of section 243(h) relief in arriving at its decision.[25] As a result, its conclusion that an alien must establish that it is more likely than not he will be subject to persecution, is subject to varying interpretations. It is hoped that courts, and administrative boards alike, giving effect to the Supreme Court's decision will recognize this possibility, and carefully follow the guidance of our nation's final arbiter.

This Note examines the important considerations that must be made before a balance between humanitarian and protectionist principles can be achieved. It is necessary to understand the deportation process and the development of the legal standards used in interpreting the immigration laws before analyzing the Supreme Court's holding. This Note will, therefore, briefly overview the deportation process and procedures involved in section 243(h) claims, and explore congressional and judicial developments that have formed current United States immigration law. After a close examination of the past conflict between the circuit courts, and the possible applicatons resulting from the Supreme Court's decision, this Note will review briefly the proposed Immigration Reform and Control Act of 1983,[26] and this bill's potential effect on the problems that have hindered the application of section 243(h) relief.

II. Background

A. Overview of Deportation Procedure

The deportation process is carried out under the jurisdiction of the Attorney General,[27] who exercises his authority through the Immigration and Naturalization Service (INS), an administrative agency.[28] After the Attorney General decides to initiate deportation proceedings against an alien, the alien is served with notice and is ordered to show cause why he should not be deported.[29] A hearing before an immigration judge

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[25]*See infra* notes 159-69 and accompanying text.

[26]*See infra* note 189.

[27]INA, *supra* note 1, at 8 U.S.C. § 1103(a). For additional discussions of the deportation procedure see, 1A Gordon & Rosenfield, *supra* note 11, §§ 5.1-5.21; Martin, *Non-Refoulment of Refugees: United States Compliance with International Obligations*, 23 Harv. Int'l L.J. 357, 366-67 (1983); Note, *Section 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal*, 13 Cornell Int'l L.J. 291, 292-95 (1980) [hereinafter cited as Note, *Section 243(h): A Prognosis and a Proposal*]; Note, *Persecution Abroad*, *supra* note 11, at 102 nn.14-17.

[28]The Attorney General has delegated his authority to the Commissioner of the INS to enforce all laws relating to immigration and the naturalization of aliens. 8 C.F.R. § 2.1 (1984). Discussions of the Attorney General's authority in this Note include this delegated authority.

[29]*Id.* § 242.1(b).

follows,[30] in which the alien is allowed to present evidence on his own behalf,[31] cross-examine government witnesses,[32] and be represented by counsel if he so chooses.[33] The INS must establish deportability by clear, unequivocal, and convincing evidence.[34] If the immigration judge issues a deportation order the alien may appeal the order to the Board of Immigration Appeals (BIA).[35] This appeal normally exhausts the alien's administrative remedies,[36] and the alien may then seek judicial review.[37] The usual method used to invoke judicial review is to petition a federal district court for a writ of habeas corpus.[38] An alien may also seek review by a federal court of appeals.[39]

During the hearing before the immigration judge, the alien may seek withholding of deportation under section 243(h).[40] The burden of establishing a likelihood of persecution rests on the alien.[41] Under the pre-1980 statute, both the likelihood of persecution and the decision to withhold deportation were subject to the Attorney General's discretionary

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[30] *Id.*

[31] INA, *supra* note 1, at 8 U.S.C. § 1252(b)(3); 8 C.F.R. § 242.16(a) (1984).

[32] INA, *supra* note 1, at 8 U.S.C. § 1252(b)(3); 8 C.F.R. § 242.16(a) (1984).

[33] INA, *supra* note 1, at 8 U.S.C. §§ 1252(b)(2), 1362; 8 C.F.R. §§ 242.10; 242.16(a) (1984).

[34] 8 C.F.R. § 242.14(a) (1984). *Cf.* INA, *supra* note 1, at 8 U.S.C. § 1252(b)(4). To be valid a decision of deportability must be based on reasonable, substantial, and probative evidence). *See also* INA, *supra* note 1, at 8 U.S.C. § 1105a(a)(4). (Upon judicial review, the alien's petition will be determined solely upon the administrative record, and any findings of fact, if supported by reasonable, substantial, and probative evidence).

The United States Supreme Court has determined that the statutory directives cited above apply only to the scope of judicial review, and not to the burden of proof required at the administrative level. Woodby v. Immigration and Naturalization Serv., 385 U.S. 276, 282 (1966) *cited in* 2 GORDON & ROSENFIELD, *supra* note 11, § 8.12c, at 8-115 n.47. The Court found that Congress had not decided what the proper burden of proof is at the administrative level, and held that *no* deportation order issued by the INS is valid unless it is supported by "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." 385 U.S. at 286 (footnote omitted).

[35] 8 C.F.R. § 242.21 (1984). *See generally id.* §§ 3.1-3.8. The decision of the immigration judge or officer is final unless certified to the BIA. *Id.* § 242.2. Unless the Attorney General determines that further review is warranted, the decision of the BIA is final. *See id.* §§ 3.1(d)(2). 3.1(h).

[36] For a discussion on the general rule requiring exhaustion of administrative remedies see 2 GORDON & ROSENFIELD, *supra* note 11, § 8.4b.

[37] The statutory right to seek judicial review is found at INA, *supra* note 1, at 8 U.S.C. § 1105a(a).

[38] Martin, *supra* note 27, at 367.

[39] *Id.* at 367 n.58.

[40] 8 C.F.R. § 208.11 (1984).

[41] *Id.* § 242.17(c). *See, e.g.*, McMullen v. Immigration and Naturalization Serv. (INS), 658 F.2d 1312, 1317 (9th Cir. 1981); Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977); Paul v. INS, 521 F.2d 194, 196-97 (5th Cir. 1975); Hamad v. INS, 420 F.2d 645, 647 (D.C. Cir. 1969); 1A GORDON & ROSENFIELD, *supra* note 11, § 5.16b, at 5-189 to 5-192.2.

determination, and thus could not be attacked on review unless his determination constituted an abuse of that discretion.[42]

The immigration judge usually requests an advisory opinion from the Department of State regarding the likelihood of persecution in a particular country.[43] Although it is not binding, such an opinion may be given "substantial weight due to its source . . . even though the State Department's opinion with respect to governments friendly with the United States may not be wholly impartial."[44] This opinion is incorporated into the hearing record unless it is deemed confidential and protected from disclosure in the interest of national security.[45] However, when a decision is based upon nondisclosed information, the decision "shall state that such information is material to the decision."[46]

Claimants' attempts to cross-examine the authors of State Department reports have been denied,[47] and, in cases where the information is deemed confidential,[48] an alien often has no opportunity to refute the

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[42]*See, e.g.*, Fleurinor v. INS, 585 F.2d 129, 133-34 (5th Cir. 1978); Moghanian v. United States Dep't of Justice, 577 F.2d 141, 142 (9th Cir. 1978). *See also* Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977); Paul v. INS, 521 F.2d 194, 197 (5th Cir. 1975); Kasravi v. INS, 400 F.2d 675, 677 (9th Cir. 1968); Asghari v. INS, 396 F.2d 391, 392 (9th Cir. 1968); Namkung v. Boyd, 226 F.2d 385, 388-89 (9th Cir. 1955). Part of the discretionary nature of this proceeding was eliminated by the 1980 Act *requiring* the Attorney General to withhold deportation upon a determination that the alien will be subject to persecution. *See supra* note 14 and accompanying text. *Cf., infra* notes 142-51 and accompanying text.

[43]*See* 8 C.F.R. § 242.17c (1984).

[44]Martin, *supra* note 27, at 367 (footnotes omitted). For a criticism regarding the practical effect of such a practice see Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968), *quoted in* Martin, *supra* note 27, at 367 n.61; Note, *Section 243(h): A Prognosis and a Proposal*, *supra* note 27, at 300-01; Note, *A Closer Look*, *supra* note 11, at 138-40. Although courts have approved of the consideration the INS gives to these reports, *see* 1A GORDON & ROSENFIELD, *supra* note 11, § 5.192.1, at 5-192-1; they have also questioned the objectivity of the reports. In Kasravi v. INS, 400 F.2d 675, the court stated:

> Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.

400 F.2d at 677 n.1, *quoted in part* in Martin, *supra* note 27, at 367 n.61. *See also* NATIONAL LAWYERS GUILD, *supra* note 3, § 8.6, at 8-27 to 8-28 (variance in grants of asylum depending on the refugee's home country).

[45]*See* 8 C.F.R. § 242.17(c) (1984).

[46]*Id.*

[47]1A GORDON & ROSENFIELD, *supra* note 11, § 5.16b at 5-192.1 and cases cited therein.

[48]*See* 8 C.F.R. § 242.17(c) (1984) (authorizing the use of non-record information if necessary in the interest of national security).

report at all.[49] Some claimants have attempted to introduce reports from other sources to rebut State Department findings but such attempts have not always been successful.[50] Thus, while the alien may present his case before the immigration judge and appeal to the BIA and the courts, proving eligibility for section 243(h) relief has been difficult given the individual alien's limited resources to gather evidence.[51]

B. Summary of Section 243(h): Its Legislative History

It was not until 1950 that Congress enacted a specific mandate forbidding the Attorney General from deporting any alien to a country where he would be subject to physical persecution.[52] In 1952, Congress amended this provision to allow the Attorney General to withhold deportation *at*

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[49]Note, *Section 243(h): A Prognosis and a Proposal*, *supra* note 27, at 301 and n.63. *See also* Zamora v. INS, 534 F.2d 1055, 1062-63 (2d Cir. 1976) (finding that input from the Department of State should be information about conditions in the alien's country rather than recommendations about how a particular request for asylum should be resolved); 2 GORDON & ROSENFIELD, *supra* note 11, § 8.17b, at 8-152 ("In [support of] the Attorney General's use of non-record information, it [has been] observed that 'the nature of the decision he must make concerning what a foreign country may do is a political issue into which the courts may not enter.' " (footnote omitted)).

[50]*See, e.g.*, Fleurinor v. INS, 585 F.2d 129, 132-33 (5th Cir. 1978) (holding that an Amnesty International Report on political conditions in Haiti that outlined the "wholesale disregard of fundamental human rights" by the Duvalier government did not add anything to Fleurinor's section 243(h) claim as it was not probative on the issue of the likelihood that the *individual alien* would be subject to persecution upon his return.); *In re* Williams, 16 I. & N. Dec. 697, 704 (1979) (finding that a 1976 Amnesty International Report was not "sufficiently probative" on the likelihood that this claimant would be persecuted). *Cf.* Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977) (reversing and remanding for reconsideration in light of an Amnesty International report).

In criticizing the weight given to State Department Reports over non-governmental reports one writer states:

> The decision whether to deport ought therefore to be made on the basis of an impartial assessment of the likelihood of persecution, according due weight to the evaluations of such independent analysts as Amnesty International. The INS ought not to be influenced by political considerations, perhaps articulated by the State Department, such as the current state of relations between the United States and the country to which deportation is proposed.

Martin, *supra* note 27, at 377 (footnotes omitted). For further criticism of the use of State Department reports see *id.*

[51]*See infra* note 70 and accompanying text.

[52]Subersive Activities Control Act of 1950, Pub. L. No. 81-831 ch. 1024, § 23, 64 Stat. 987, 1010 (codified as amended at 8 U.S.C. § 1253(h)(1982)).

Most courts construed this section as requiring the Attorney General to find that the alien claiming this relief would *not* be subject to persecution upon deportation. *See* United States *ex rel.* Harisiades v. Shaughnessy, 187 F.2d 137, 142 (2d Cir. 1951), *aff'd*, 342 U.S. 580 (1952). *But see* United States *ex rel.* Dolenz v. Shaughnessy, 107 F.Supp. 611, 613 (S.D.N.Y.), *aff'd*, 200 F.2d 288 (2d Cir. 1952), *cert. denied*, 345 U.S. 928 (1953). *See also* 1A GORDON & ROSENFIELD, *supra* note 11, § 5.166, at 5-175.

his discretion if he *determined* that the alien would suffer physical persecution if deported.[53]

In 1965, Congress broadened the language of this section by deleting "physical persecution" and allowing the Attorney General to withhold deportation if, "in his opinion[,] the alien would be subject to persecution on account of race, religion, or political opinion."[54] The purpose of this change was to aid those refugees who might be victims of persecution other than physical violence.[55]

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees (1967 Protocol).[56] The 1967 Protocol incorporated most of the provisions of the United Nations Convention Relating to the Status of Refugees (1951 Convention).[57] Article 33(1) of the 1951 Convention states: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[58]

The language of the Protocol was much broader than the language used in section 243(h) and members of Congress were concerned that a potential conflict between the Protocol and existing laws would arise.[59]

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[53]INA, *supra* note 1, § 243(h), Pub. L. No. 82-414, 66 Stat. 163, 214 (1952) (codified as amended at 8 U.S.C. § 1253(h)(1982)).

[54]Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (1965) (codified as amended at 8 U.S.C. § 1253(h)(1982)).

[55]1A GORDON & ROSENFIELD, *supra* note 11, § 5.16b, at 5-176.

[56]Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6257, *T.I.A.S.* No. 6577, 606 U.N.T.S. 268 [hereinafter cited as 1967 Protocol]. Accession is the adoption of a particular proclamation into United States laws, and has the effect of binding the United States as if an original party. For an excellent discussion of the 1967 Protocol and the effect of the United States' accession see Martin, *supra* note 27.

[57]United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter cited as 1951 Convention]. The 1967 Protocol incorporated virtually all of the 1951 Convention provisions. The only significant difference was that the 1967 Protocol eliminated narrow geographical limitations and the 1951 provisions that limited relief to those who had become refugees prior to January 1, 1951. *See generally* Martin, *supra* note 27, at 361-62.

[58]1951 Convention, *supra* note 57, art. 33(1). Article 33 is entitled "Prohibition of Expulsion or Return ('Refoulement')." The only exception to this provision is when the refugee is a threat to the security of the host state or has been convicted for involvement in a "particularly serious crime." *Id.* art. 33(2). Article 1(a)(2) of the 1951 Convention, *supra* note 57, defines "Refugee" as:

> [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it.

[59]For a good summary of the legislative discussions leading up to the United States' accession to the 1967 Protocol see *In re* Dunar, 14 I. & N. Dec. 310 (1973).

In the legislative proceedings leading to the United States' accession to the Protocol, both the President and the State Department assured Congress that existing legislation need not be amended in order to comply with the Protocol.[60] In a statement to the Senate Foreign Relations Committee, one official said that "[t]he Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act."[61] As was promised, Congress' adoption of the Protocol did little to change the the proceedings or the dispostions of section 243(h) claims.[62]

Finally, with the enactment of the Refugee Act of 1980,[63] Congress substantially changed section 243(h)[64] along with other sections of the Immigration and Nationality Act of 1952, incorporating some of the 1967 Protocol language.[65] As amended by the Refugee Act of 1980, section 243(h) now provides that "[t]he Attorney General *shall not* deport or return

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[60]In *Dunar*, the Board related the following legislative history:

> Thus, in submitting the Protocol to the President, the Secretary of State informed him that, 'United States accession to the Protocol would not impinge adversely upon the laws of this country.' The Secretary further stated:
>
> > Accession to the Protocol would promote our foreign policy interests through reaffirming, in readily understandable terms, our traditional humanitarian concerns and leadership in the field. It would also convey to the world our sympathy and firm support in behalf of those fleeing persecution. Actually, most refugees in the United States already enjoy legal and political rights which are equivalent to those which states acceding to the Convention or the Protocol are committed to extend to refugees within their territories . . . .
>
> [T]he President stated:
>
> > . . . Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere.

14 I. & N. Dec. at 314 (footnotes omitted).

[61]S. EXEC. REPT. No. 14, 90th Cong., 2d Sess. 6 (1968), *quoted in In re* Dunar, 14 I. & N. Dec. at 317.

[62]*See infra* notes 88-95 and accompanying text.

[63]*See supra* note 13.

[64]*See supra* notes 12 and 14.

[65]One significant change was the incorporation of the 1967 Protocol's definition of "refugee" into the statute.

As amended by the Refugee Act of 1980, the INA now reads:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

Refugee Act of 1980, *supra* note 13, 8 U.S.C. § 1101(a)(42) (Supp. 1984).

any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[66] The Refugee Act thus removed the discretionary provisions of the prior section 243(h)[67]. Nevertheless, the legislative history relevant to both the accession to the 1967 Protocol and the Refugee Act of 1980 is unclear, leaving the impact of these changes on United States immigration law uncertain.

III. Conflict in the Courts: Past and Present

In all section 243(h) claims, the grave consequences of returning an alien to a country where he will be subject to persecution, possibly even death, require that the alien's plea be given "fair consideration"[68] and that the immigration judge "allow the alien wide latitude in presenting his evidence."[69] Because an alien faces the difficult task of obtaining evidence that demonstrates his eligibility for section 243(h) relief,[70] the burden of proof an alien must shoulder is of great concern to all branches of government. The humanitarian principles this country prides itself

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[66]Refugee Act of 1980, *supra* note 13, at 8 U.S.C. § 1253(h)(1)(Supp. 1984)(emphasis added). For a detailed discussion of the legislative history of the Refugee Act of 1980 see Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981). The legislative history of section 243(h) prior to the Refugee Act of 1980 can be found at Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 Wash. U.L.Q. 59, 67-71.

[67]For a discussion of other changes the 1980 Act made in section 243(h) see *infra* notes 101-07 and accompanying text.

[68]*See* 1A Gordon & Rosenfield, *supra* note 11, § 5.16b, at 5-188.

[69]*Id.* § 5.16b, at 5-190 to 5-191 (citing *In re* Joseph, 13 I. & N. Dec. 70 (1968) (footnote omitted) ("technical rules of evidence ordinarily not controlling")).

[70]One commentator addresses the difficulty aliens face in compiling evidence necessary to show the existence of a threat to that particular alien's life or freedom. *See* Note, *Section 243(h): A Prognosis and a Proposal*, *supra* note 27, at 300-01. The author states that "[a]lthough documents showing generally repressive conditions may be material, an alien's failure to produce persuasive evidence that he will be singled out for persecution is fatal to his claim. As a potential refugee living far from his homeland, an alien is in no position to produce the required evidence." *Id.* (footnotes omitted). The writer also points out the vast discrepancy in evidence available to the alien and evidence available to the government. "Whereas an alien's only evidence may be his own testimony, the INS can draw on an interagency network for information to discredit the alien's claim. The INS customarily solicits reports from the State Department [and] [i]mmigration judges may rely on these reports . . . ." *Id.* at 301 (footnotes omitted). For an alien living far from home, not only is it difficult to compile the evidence required to meet a stringent burden of proof, but it becomes almost impossible to refute the evidence presented by the INS which is supported by the wealth of information available to the State Department. *See supra* notes 43-51 and accompanying text. Of even greater concern should be the criticism of some commentators that a factor often influencing the outcome of the agency hearing is the status of United States' foreign relations with the alien's country. *See* Martin, *supra* note 27, at 379; Note,

in preserving are threatened when these standards of proof are set at unreachable heights. On the other side of the scale, however, setting the burden of proof too low would allow any alien with an arguably valid fear of persecution to escape deportation, undermining Congress' attempts to place controls over immigration prodecure.[71]

The United States' accession to the 1967 Protocol and the changes made in section 243(h) by the Refugee Act of 1980 have both been the bases for challenges to the restrictive "clear probability" burden of proof. An understanding of how this burden previously operated in administrative and court decisions is essential to a contemporary analysis of section 243(h).

A. Prior to 1980: The Effect of Accession to the 1967 Protocol on Section 243(h) Claims

Before the 1980 amendments to section 243(h), the Attorney General was authorized to exercise two types of discretion under this section.[72] The Attorney General not only determined an alien's statutory eligibility for section 243(h) relief, but also decided whether relief should be granted once eligibility was established.[73] As a result, courts viewed INS decisions with deference and, in effect, limited themselves to determining whether a denial of section 243(h) relief was an abuse of discretion.[74]

Section 243(h): A Prognosis and a Proposal, supra note 27, at 298-99; Note, *Persecution Claims-The Expanding Scope of Section 243(h) of the Immigration and Nationality Act*, 13 TEX. INT'L L.J. 327, 338 n.87 (1978) [hereinafter cited as Note, *Persecution Claims*].

[71]The wisdom of placing limits on immigration was noted in Villena v. INS, 622 F.2d 1352 (9th Cir. 1980):

> The INS should have the right to be restrictive. Granting . . . motions [to reopen] too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.

Id. at 1362 (Wallace, J., dissenting).

In Henry v. INS, 552 F.2d 130 (5th Cir. 1977), Judge Goldberg stated: "Our sadness at all circumscriptions of freedom, however, is no charter to disregard the procedural system created to determine the merit of such claims." *Id.* at 132.

[72]*But see* text accompanying notes 93-94, 106-07 & 142-51 *infra*.

[73]For support for the theory of two types of discretion see NATIONAL LAWYERS GUILD, *supra* note 3, § 10.1, at 10-8; Martin, *supra* note 27, at 371-72; Note, *Section 243(h): A Prognosis and a Proposal*, *supra* note 27, at 296-98.

This view, however, has not been espoused by all. *See* 2 GORDON & ROSENFIELD, *supra* note 11, § 8.17b, at 8-153 to 8-154.

[74]*See* Moghanian v. United States Dep't of Justice, 577 F.2d 141, 142 (9th Cir. 1978); Pierre v. United States, 547 F.2d 1281, 1289 (5th Cir. 1977); Shkukani v. INS, 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971). *See also* Note, *Persecution Abroad*, *supra* note 11, at 105 n.32 and cases cited therein. Yet a few courts purported to find their

The INS requires an alien to prove by a clear probability that he would be subject to persecution to be eligible for relief under section 243(h). This standard is not found in the statutes; rather, it was developed over the years by the Attorney General to articulate the alien's burden of proof.[75] Nevertheless, the limited scope of judicial review led the courts to approve the clear probability test as the appropriate standard of proof.[76]

Upon the United States' accession to the 1967 Protocol, questions arose surrounding section 243(h) relief. Although the accession to the treaty was presented to Congress and the President as a reaffirmation of "our traditional humanitarian concerns and leadership" in the field of immigration,[77] the treaty differed significantly from existing United States law.

Prior to accession, section 243(h) *allowed* the Attorney General to withhold deportation if, "in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion."[78] The Protocol differed in two important respects from section 243(h) as it existed in 1968.[79] First, withholding deportation was *mandatory* under the Protocol upon a finding of eligibility, whereas section 243(h) authorized the Attorney General to exercise discretion in granting relief, even when eligibility was established.[80]

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scope of review somewhat broader in section 243(h) claims—that of determining whether or not the decision to deny relief was based on substantial evidence. *See* Hamad v. INS, 420 F.2d 645 (D.C. Cir. 1969); United States *ex rel.* Kordic v. Esperdy, 386 F.2d 232 (2d Cir. 1967). *See also* Martin, *supra* note 27, at 371-72; Note, *Persecution Abroad*, *supra* note 11, at 104-06; Note, *Persecution Claims*, *supra* note 70, at 332-33.

> One commentator notes that, in 1952, the United States Supreme Court stated:
> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Note, *Persecution Abroad*, *supra* note 11, at 106 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (footnote omitted)).

Another commentator states that the courts held the view that "[j]udicial intervention would be proper only when the Attorney General's exercise of his powers involved denial of procedural due process, was 'arbitrary and capricious,' or evinced misconstruction of the statute." Martin, *supra* note 27, at 371-72 (footnotes omitted).

[75] *See supra* notes 40-46 and accompanying text.

[76] *See, e.g.*, Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). *See also* cases cited *infra* note 95.

[77] *In re* Dunar, 14 I. & N. Dec. 301, 314 (1973) (citation omitted).

[78] INA, *supra* note 1, § 243(h)(codified at 8 U.S.C. § 1253(h)(1976)). *See supra* note 13.

[79] These differences are also discussed at Note, *Persecution Abroad*, *supra* note 11, at 100-01.

[80] *Compare* 1967 Protocol, *supra* note 56, art. 33 ("[n]o contracting state shall expel or return . . .") *with* INA, *supra* note 1, § 243(h) (codified as amended at 8 U.S.C. § 1253(h) (1976) (current version at 8 U.S.C. §1253(h) (1982)). ("The Attorney General is *authorized* to withhold deportation of any alien within the United States to any country in

A second difference was the legal standard used to determine eligibility. The Protocol defined "refugee" as one having a "well-founded fear" of persecution[81] while the INS used a stricter evidentiary standard—that of "clear probability."[82] These differences formed the basis for challenge at both the administrative level[83] and in the reviewing courts.[84] However, it was generally found that the accession to the Protocol did not change the strict legal standard used in section 243(h) hearings.[85]

In re Dunar[86] was one of the first agency hearings to discuss the effect of the accession to the 1967 Protocol. The alien in that case, Dunar, appealed the order of an immigration judge denying his request for withholding of deportation under section 243(h). Dunar argued that accession to the Protocol changed both the alien's burden of proof and the nature of the Attorney General's determinations under section 243(h).[87]

The Board first examined Dunar's contention that accession to the Protocol changed the alien's burden of proof under section 243(h). Dunar argued that after accession the alien need only show a well-founded fear of persecution rather than a "clear probability" of persecution. Dunar contended that a purely subjective test—looking to the alien's "own state of mind"—would be sufficient to satisfy this burden.[88]

The BIA rejected the use of a purely subjective test and concluded that, as before the accession to the 1967 Protocol, some objective evidence

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which *in his opinion* the alien would be subject to persecution . . . ." (emphasis added)). Although pre-1980 section 243(h) spoke in terms of the Attorney General's discretion, the BIA in *In re* Dunar, 14 I. & N. Dec. 310 (1973), said "we know of none in which a finding has been made that the alien has established the clear probability that he will be persecuted and in which section 243(h) withholding has nevertheless been denied in the exercise of administrative discretion." *Id.* at 322.

[81] *See* 1951 Convention, *supra* note 57, art. 1(a)(2); *supra* note 58.

[82] *See supra* notes 65, 75-76.

[83] *E.g., In re* Dunar 14, I. & N. Dec. 310 (1973).

[84] *E.g.,* Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977); Kashani v. INS, 547 F.2d 376 (7th Cir. 1977).

[85] *See supra* note 84 and *infra* notes 86-91 and accompanying text.

[86] 14 I. & N. Dec. 310 (1973).

[87] The Board of Immigration Appeals prefaced its discussion of the issues raised by Dunar with an examination of several canons of construction regarding the effect of a treaty on an earlier enacted statute. The Board stated:

> Since it supplements and incorporates the substantive provisions of the Convention, the Protocol must be regarded as a treaty, which is part of the supreme law of the land, United States Constitution, Article VI, Cl. 2. Such a treaty, being self-executing, has the force and effect of an act of Congress.

Id. at 313 (footnote and citation omitted).

The BIA noted that "[r]epeals by implication are never favored, [thus] a later treaty will not be regarded as repealing an earlier enactment by implication unless the two are absolutely incompatible . . . ." *Id.* at 314 (citing Johnson v. Browne, 205 U.S. 309, 321 (1907)). The Board also found that "[w]hen a statute and a treaty relate to the same subject, an attempt must be made to give effect to both, if that can be done without violating the language of either." 14 I. & N. Dec. 310.

[88] *Id.* at 319.

is required to receive section 243(h) relief.[89] The Board first noted that the standard the claimant was attempting to satisfy—well-founded fear—itself ruled out a purely subjective apprehension. "[I]f all [the alien] can show is that there is a merely conjectural possibility of persecution, his fear can hardly be characterized as 'well-founded.'"[90] Looking to legislative history, the Board found that accession to the Protocol did not substantially change section 243(h)[91] and it therefore refused to enunciate a new burden of proof. The Board concluded that "distinctions in terminology" could be reconciled on a case-by-case basis in the future.[92]

Dunar's second argument was that the Protocol's mandatory language of withholding deportation required a change in the nature of the Attorney General's determination, because section 243(h) allowed the Attorney General to exercise discretion in granting relief. The Board rejected this contention also. Noting the "humanitarian values" underlying section 243(h), the Board was not convinced that the statute actually left relief in the Attorney General's discretion once eligibility was established.[93] Additionally, the Board concluded that because relief had never been denied once an alien had established a clear probability of persecution, the Protocol language "can produce no meaningful change in the way section 243(h) has been applied."[94]

After accession, most reviewing courts continued to approve the INA's use of the clear probability test to determine whether relief should be granted under section 243(h).[95] Some courts went one step further and relied on the language in *Dunar* to hold that the clear probability and well-founded fear standards were equivalent.[96] *Dunar*, however, did not decide that these standards were equivalent.[97]

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[89]*Id.* The Board in *Dunar* did not examine the difference in objective evidence required under either a well-founded fear standard or that of clear probability. One author suggests that under the clear probability standard the evidence must relate specifically to the individual claimant and the threat or fear of persecution must be timely, that is, it must relate to a threat currently in force. Note, *Persecution Abroad*, *supra* note 11, at 103-04. In contrast, the objective evidence required under a well-founded fear standard does not require such specificity. Thus, a well-founded fear of persecution could be demonstrated by "episodes of past persecution, evidence that other persons in similar circumstances to those of the applicant have been persecuted, and evidence of intervening events creating a risk of persecution during the applicant's absence." *Id.* at 109 (footnotes omitted).

[90]14 I. & N. Dec. at 319.

[91]*Id.*

[92]*Id.* at 320-21.

[93]The Board explained: "It is highly probable that in referring to the Attorney General's 'broad discretion' under section 243(h), the cases contemplate the manner in which the Attorney General arrives at his opinion and the limited scope of judicial review, rather than the eligibility-discretion dichotomy." *Id.* at 322.

[94]*Id.* at 323.

[95]*E.g.*, Martineau v. INS, 556 F.2d 306 (5th Cir. 1977); Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977) (and cases cited therein).

[96]*E.g.*, Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982); Kashani v. INS, 547 F.2d 379, 379 (7th Cir. 1977).

[97]However, in *Dunar*, the BIA only rejected a purely subjective test for determining

From the legislative history leading up to accession to the Protocol it is arguable that although Congress did not contemplate any major amendments to existing laws, some changes that might be required to conform the administrative procedures surrounding deportation to the specific provisions of the Protocol were anticipated. Congress was told that although "[t]he Attorney General [would] be able to administer such provisions in conformity with the Protocol *without amendment of the Act*[,][98] . . . existing regulations [having] to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of [the] convention . . . not presently contained in the Immigration and Nationality Act."[99]

The courts, however, continued to rely on the discretionary language of the statute, finding their scope of review limited to determining whether the Attorney General had abused his discretion in denying a withholding of deportation.[100] Arguably, it is for this reason that the question, whether accession to the 1967 Protocol altered the "clear probability" burden of proof, was not given as close an examination by the reviewing courts as the grave consequences of a denial of section 243(h) relief warrranted.

B. The Effect of the Refugee Act of 1980 on Section 243(h) Claims

The Refugeee Act of 1980[101] altered section 243(h) in several ways.[102] First, it incorporated the Protocol's definition of "refugee" into the Immigration and Nationality Act of 1952.[103] Second, the Act broadened the class of aliens protected under section 243(h), by making eligible under the statute those aliens whose lives or freedom would be threatened on the basis of nationality or membership in a particular social group, as

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whether an alien has a valid fear of persecution. The Board did not decide whether the two standards were equivalent. Rather, the Board noted that they were not substantially different and that any fine distinctions between the two standards could be dealt with on a case-by-case basis. 14 I. & N. Dec. 310, 321 (1973).

[98]S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 6 (1968), *quoted in In re Dunar 14 I. & N. Dec. at 317 (emphasis added).*

[99]S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 8 (1968), *quoted in* 14 I. & N. Dec. at 317. Moreover, a reduction in the alien's burden of proof under section 243(h) would seem wholly consonant with congressional concerns in acceding to the Protocol. *See supra* notes 77-85 and accompanying text.

[100]*See, e.g.*, Fleurinor v. INS, 585 F.2d 129, 133-34 (5th Cir. 1978); Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977); Kashani v. INS, 547 F.2d 376 (7th Cir. 1977); *See also* 2 GORDON & ROSENFIELD, *supra* note 11, § 8.17, at 8-149. The Fifth Circuit Court of Appeals tried to find a middle ground: "It is enough to recognize that judicial review of INS decisions on persecution claims is deferential, and at the same time to remember that this review ought not to be altogether perfunctory." Coriolan v. INS, 559 F.2d 993, 998 n.9 (5th Cir. 1977).

[101]*See supra* note 13.

[102]*See infra* text accompanying notes 103-05.

[103]*See supra* notes 58-65.

well as those aliens previously protected because they would be subject to persecution on account of their race, religion, or political opinion.[104] Third, the 1980 Act *required* the Attorney General to withhold deportation if eligibility is established under section 243(h).[105]

Some United States courts of appeals found that by making relief mandatory, the Refugee Act of 1980 reduced the deference given to the Attorney General's determination and expanded the role of the reviewing courts.[106] Thus, courts would no longer be limited to reviewing solely for abuse of discretion[107] but would be able to review more carefully the Attorney General's determinations regarding the alien's eligibility for relief and the burden of proof the alien must shoulder in section 243(h) claims.

The courts, however, were in disagreement regarding the effect of the 1980 amendments upon either the legal standards to be applied in section 243(h) claims, or the appropriate scope of review of administrative determinations. The question, whether the alien is required to prove a clear probability of persecution in light of the 1980 statutory changes was an important, yet difficult one, difficult because of Congress' failure to satisfactorily state its intent in adopting the language of the Protocol, and important because of the grave consequences that might follow should an alien be denied section 243(h) relief.

IV. Interpretation of the New Section 243(h)

A. Overview

In *Stevic v. Sava*,[108] a citizen of Yugoslavia, Stevic, entered the United States in 1976 to visit his sister, a permanent United States resident. Approximately six weeks later, his visa expired and deportation proceedings began. From that time until 1981, Stevic made attempts to avoid deportation,[109] including motions to the Board of Immigration Appeals

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[104]*See supra* note 14.

[105]*See id.* Arguably, however, the Attorney General may still be allowed discretion in determining whether the alien is eligible for section 243(h) relief; that is, whether the alien's right to life or freedom would be threatened.

[106]Reyes v. INS, 693 F.2d 597 (6th Cir. 1982); Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), *rev'd*, Immigration and Naturalization Serv. (INS) v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973); McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981).

[107]In McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981), the Ninth Circuit Court of Appeals held that in light of the changes in section 243(h) brought about by the Refugee Act of 1980, factual findings under section 243(h) are subject to review under a "substantial evidence test." *Id.* at 1316. *But see* Marroquin-Manriquez v. INS, 699 F.2d 129, 133 n.5 (3rd Cir. 1983) (rejecting the substantial evidence test "because it ignores the necessary application of expertise" in a section 243(h) determination).

[108]678 F.2d 401 (2d Cir. 1982), *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[109]*Id.* at 402-04. However, Stevic failed to act several times when the opportunity arose. He never filed for extensions of deportation dates, or appealed the denials of his motions

(BIA) "to reopen the deportation proceedings for the purpose of filing an application for withholding of deportation . . . under Section 243(h) of the Immigration and Nationality Act of 1952."[110] A second motion, like his first, was denied.

In denying his motion to reopen deportation proceedings, the BIA concluded that Stevic had failed to show that he would be subject to persecution if deported to Yugoslavia. "A motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent."[111]

The Second Circuit Court of Appeals held that the Refugee Act of 1980 changed the legal standard relating to application for section 243(h) relief,[112] and therefore reversed the BIA's denial of Stevic's motion. The Second Circuit first noted that the Refugee Act of 1980 adopted the definition of "refugee" found in the 1967 Protocol.[113] The Protocol defined "refugee" as one having a "well-founded fear of persecution" and prohibited deportation of a refugee if he would be subjected to persecution upon return to a particular country.[114] Further, the court found the Protocol language "considerably more generous than the 'clear probability' test [previously] applied under Section 243(h)."[115] The Second Circuit emphasized the legislative history of the 1980 amendments indicating that section 243(h) was to be construed consistently with the Protocol.[116] The court therefore found that in 1980 "the language of [United States] immigration law was explicitly conformed to that of the Protocol, notwithstanding the earlier assurances that statutory changes were not necessary to comply with the Protocol."[117]

One ground for the *Stevic* court's holding came from an examination of two provisions of the Immigration and Nationality Act of 1952 dealing

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to reopen or his request for asylum. In fact, when the denial of one of his requests was based on a mistake of fact, the court noted the mistake but refused to grant relief "since no effort was made at the time either to bring the error to the Director's attention or to appeal. "We . . . decline to act on the basis of a factual error in a discretionary decision now some four and one-half years old." *Id.* at 404.

[110]*Id.* at 403. *See* 8 C.F.R. §242.22 (1984) (reopening or reconsideration).

[111]*Stevic*, 678 F.2d at 403 (quoting the January 18, 1980 decision of the BIA denying Stevic's motion to reopen) (citations omitted), *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). On September 3, 1980, the BIA again denied a motion to reopen based on the same reasoning. *Id.*

[112]*Id.* at 408.

[113]*Id.* at 409.

[114]*See supra* note 65.

[115]*Stevic*, 678 F.2d at 405, *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[116]*Id.* at 409 (quoting H.R. REP. No. 781, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 161).

[117]*Stevic*, 678 F.2d 405, 407, *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). *See supra* notes 98-99 and accompanying text.

with asylum for aliens: section 243(h), governing deportable aliens already in the country, and former section 203(a)(7),[118] governing aliens outside the country seeking political asylum in the United States.

The legal standard under former section 203(a)(7) was a showing of "good reason" to fear persecution.[119] This standard was less stringent than the clear probability requirement under section 243(h), and closely resembled the Protocol language dealing with deportable aliens.[120]

The Second Circuit found the similarities between the standard under former section 203(a)(7) and the Protocol significant in light of the 1980 amendments to the INA. The court noted that the 1980 Act, and INS regulations promulgated under authority of the Act, eliminated the distinction between standards for determining eligibility under former section 203(a)(7) and section 243(h).[121] The court acknowledged the legislative history indicating that the Refugee Act of 1980 would effect no major changes in the application of section 243(h),[122] but reasoned that because the Act requires that "a uniform test of 'refugee' be applied to all aliens, [whether seeking relief under either section 203(a)(7) or section 243(h)] the legislative history indicating no major changes cannot alter the inevitable consequence that some change in administrative practice must occur."[123]

Without clear guidance from Congress, the court was therefore faced with a choice between applying the stringent clear probability test to re-

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[118]INA, *supra* note 1, § 203(a)(7) (codified as amended at 8 U.S.C. § 1153(a)(7) (1976) (current version at 8 U.S.C. § 1157 (1982)). This section provided in part:

> Conditional entries shall next be made available by the Attorney General . . . to aliens who satisfy an Immigration and Naturalization Service officer . . . (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion . . . .

Id.

[119]*Stevic*, 678 F.2d at 405, *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[120]*Id.* The 1967 Protocol, adopting the language of the 1951 Convention, defined "refugee" as one who has a "well-founded fear of persecution." The court noted that the drafters of the 1951 Convention "believed a showing of 'good reason' to fear persecution was sufficient to prove one's status as a 'refugee.' . . . [a test that is] identical to the one used . . . to describe the . . . standard under . . . section 203(a)(7)." *Id.* (citations omitted). In other words, the standard of former section 203(a)(7) was sufficient, under the Protocol, to grant a withholding of deportation.

[121]*Id.* at 407-08. *See* Refugee Act of 1980, *supra* note 13, § 208(a), at 8 U.S.C. § 1158(a); 8 C.F.R. § 208.3 (1984).

[122]The court said: "The Senate Report seems to assume, however, that the amendments to Section 243(h) work no major change. . . . The House report is more ambiguous . . . ." *Stevic*, 678 F.2d at 408 (citations omitted), *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[123]*Id.*

quests for asylum under both 243(h) and 203(a)(7), or applying the more lenient standard of 203(a)(7) to 243(h) claims to achieve the required single standard. The court stated that, given the humane attitude underlying the 1980 Act, "it would bring about wholly anomalous results to read the Act to impose a far more stringent legal test upon entry by refugees than had existed in prior law."[124]

Another, and perhaps the most significant, basis for the *Stevic* court's holding was its conclusion that the elimination of discretionary language in section 243(h) granted the courts a broader role in the deportation process. The court found that by making section 243(h) relief mandatory upon a finding of eligibility, "the Refugee Act of 1980 calls upon courts, in construing the Act, to make an independent judgment as to the meaning of the Protocol[;] . . . a reviewing court [now] has a clear responsibilty to assure that the non-discretionary exercise of Section 243(h) authority has been performed according to the correct standards of law."[125] Exercizing its broader role, the Second Circuit concluded that "under Section 243(h), deportation must be withheld, upon a showing *far short of a 'clear probability'* that an individual will be singled out for persecution."[126]

Less than six months after *Stevic* was decided, the Third Circuit Court of Appeals addressed the same issue as had the Second Circuit in *Stevic*: whether clear probability is the proper standard to be used in section 243(h) claims after the enactment of the Refugee Act of 1980. In *Rejaie v. Immigration and Naturalization Service*,[127] the alien petitioned for review

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[124]*Id.*

[125]*Id.* at 409. The Second Circuit's recognition of the expanded scope of review is supported by an earlier Ninth Circuit Court of Appeals decision. McMullen v. Immigration and Naturalization Service, 658 F.2d 1312 (9th Cir. 1981), was one of the first cases in which a court examined the effect of the Refugee Act of 1980 on section 243(h) relief. In *McMullen*, the Ninth Circuit determined that the 1980 amendments, eliminating the discretionary language of section 243(h), required the Board to withhold deportation only upon a finding of certain facts. The Board, therefore, was required for the first time to make a factual determination in section 243(h) proceedings. *Id.* at 1316.

The Ninth Circuit recognized that factual findings of an administrative agency "are normally subject to the substantial-evidence standard of review," *id.* (citations omitted), and concluded that courts now play a broader role in reviewing section 243(h) agency determinations. "The role of the reviewing court necessarily changes when the charge to the agency changes from one of discretion to an imperative." *Id. See also* Note, *Persecution Abroad*, *supra* note 11, at 115-18 (discussing *McMullen*). Thus, the *McMullen* court held that the proper scope of review had increased from abuse of discretion to a substantial evidence test. 658 F.2d at 1316.

McMullen provides support for the *Stevic* court's conclusion that the Refugee Act of 1980 called upon the courts "to make an independent judgment as to the meaning of the Protocol." 678 F.2d at 409, *rev'd* INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[126]*Stevic*, 678 F.2d at 409 (citation omitted) (emphasis added), *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[127]691 F.2d 139 (3d Cir. 1982). The claimant was a citizen of Iran admitted to the United States in 1978 to attend school. After failing to depart upon the expiration of his

of the BIA's denial of his second motion to reopen deportation proceedings, contending that the BIA had incorrectly required him to prove a clear probability of persecution.[128] Rejaie claimed that as a result of the passage of the Refugee Act of 1980, such a stringent burden of proof was no longer required.

The Third Circuit examined the Act and its legislative history to determine the validity of this claim. The *Rejaie* court found that "the modification of § 243(h) was effected solely for the *sake of clarity* so that its language would conform more closely with the language of the Protocol."[129] Finding no ambiguity in statements made by Congress, the *Rejaie* court determined that the Second Circuit "apparently misapprehended" the legislative history of both the Refugee Act of 1980 and the accession to the 1967 Protocol.[130] The court held[131] that well-founded fear is equal to clear probability, thereby denying the alien's petition for review.[132]

Until recently, this conflict continued in the federal courts.[133] In June, 1984, the United States Supreme Court attempted to end the confusion

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visa, and having failed to request permission to stay, the claimant was ordered to return to Iran. *Id.* at 141-42.

[128]*Id.* at 141-42.

[129]*Id.* at 144 (emphasis added). The court found that "[i]n modifying section 243(h), the House clearly understood that the standards under § 243(h) and under the Protocol were the same." *Id.* The court also noted that the Board continued to use the same standards in determining eligibility as it had prior to the Refugee Act of 1980. *Id.* at 145. The court explained that the Board, while taking into consideration the alien's subjective apprehensions, still required the alien to present objective evidence demonstrating a "realistic likelihood" that he would be persecuted. *Id.*

[130]*Id.* at 146.

[131]*Id.* at 146 (citing Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978); Martineau v. INS, 556 F.2d 306 (5th Cir. 1977); Pereira-Diaz v. INS, 551 F.2d 1149 (9th Cir. 1977); Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976)).

[132]691 F.2d at 146-47.

[133]About one month after the *Rejaie* decision, the Sixth Circuit Court of Appeals decided Reyes v. INS, 693 F.2d 597 (6th Cir. 1982). Unlike the Third Circuit in *Rejaie*, the Sixth Circuit recognized its broader role in reviewing the Attorney General's denial of section 243(h) relief. Reversing the BIA's denial of section 243(h) relief, the Sixth Circuit agreed with the *Stevic* holding that an alien is required to show something less than a clear probability of persecution after the 1980 amendments. 693 F.2d at 599-600. Applying the substantial evidence test the *Reyes* court held that, considering the record as a whole, the petitioner's evidence was "sufficient to bring her risk within the tenor and spirit of the new provisions of the Act." *Id.* at 600 (citing Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973); McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981)).

Shortly after the *Reyes* decision, the Third Circuit Court of Appeals was again faced with the assertion that the Refugee Act of 1980 changed the burden of proof required of the alien in section 243(h) claims. In Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983), the claimant argued that he was no longer required to show a clear probability of persecution due to the 1980 amendments. The Third Circuit relied on its decision in *Rejaie* to hold that the BIA committed no error by using the clear probability standard. *Id.* at 133. The

surrounding this statute by redefining the "clear probability" standard.[134] However, the Court's decision, although unintentionally, arguably, resulted in the creation of a new standard. That is, an alien must bring forth evidence establishing that it is more likely than not that he will be persecuted if returned to a particular country.[135]

B. The Supreme Court In Review

The decision of the Second Circuit was reversed in *Immigration and Naturalization Service v. Stevic*.[136] There, the Supreme Court rejected Stevic's contention that the Refugee Act of 1980[137] changed the standard of proof an alien must show to become eligible for section 243(h) relief. The Court concluded that it was not Congress' intent, in amending the language of section 243(h), to lower the burden of proof required, rather the change was made simply so that the language of U.S. laws conformed more closely to that of our international obligations.[138] Thus, the Supreme Court held that an alien must establish a clear probability that he will be subject to persecution.[139]

The Court went on to note that it was avoiding "any attempt to state the governing standard."[140] Rather, it simply established that the burden of proof required under section 243(h)—"clear probability"—calls for a showing that it is "more likely than not" the alien will be persecuted upon deportation.[141]

Interestingly, however, it appears that the Supreme Court *has* come forth with a new standard under section 243(h). Although several observations made by the Supreme Court are potential targets for criticism, implicit in the Court's definition of "clear probability" is a new standard of proof for the alien. As a result of the Court's language, an alien must now only show that it is "more likely than not" that he will be subject to persecution. Although language can be found in the opinion indicating there has been no change in the clear probability standard, a close examination of the Court's decision will reveal that clear probability now

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Third Circuit also held that its scope of review was limited to determining whether the denial of section 243(h) relief was an abuse of discretion. *Id.* The court noted the *McMullen* decision, where the Ninth Circuit held the judicial scope of review was broadened by the Refugee Act of 1980. Yet it rejected this reasoning "because it ignore[d] the necessary application of expertise implicated in the determination that a fear of persecution is well-founded." *Id.* at 133 n.5.

[134]INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[135]*Id.*

[136]*Id.*

[137]*See supra* note 13.

[138]52 U.S.L.W. at 4726.

[139]*Id.* at 4725.

[140]*Id.* at 4730.

[141]*Id.*

simply requires the alien show persecution is more likely than not in order to be afforded relief under the section.

1. The Scope of Judicial Review After the Refugee Act of 1980.—It has been argued that prior to the Refugee Act of 1980, the Attorney General had two types of discretion: whether the alien was eligible to receive section 243(h) relief and, if so, whether or not such relief should be granted.[142] This discretion caused the reviewing courts to view INS determinations with great deference. As a result, any standard set in the exercise of the Attorney General's first type of discretion was accepted by the reviewing courts as the appropriate standard. Only if it was determined to be a clear abuse of discretion was it rejected.[143]

The Refugee Act of 1980 amended section 243(h)[144] so that the Attorney General is required to withhold deportation upon the appropriate showing of persecution.[145] The Second Circuit Court of Appeals determined that the mandatory language of the amendment broadened its scope of review.[146] It recognized that the courts were no longer required to adhere to the standards required by the Attorney General.

The Second Circuit was not the first to recognize the courts' increased scope of review afforded by the 1980 amendment.[147] In *McMullen v. Immigration and Naturalization Service*,[148] the Ninth Circuit Court of Appeals determined that the 1980 amendments required the Board to withhold deportation only upon a finding of certain facts. This, the court concluded, required the reviewing court's role to necessarily change.[149]

Yet, the United States Supreme Court summarily dismissed any discussion of the possible increased role of the reviewing court. It held that "[t]he removal of the Attorney General's discretion to withhold deportation after persecution was established with the requisite degree of certainty relates to the consequences of meeting the standard, and not to the standard itself."[150] Implicit in this statement is the recognition that there are two levels of discretion exercised by the Attorney General in a section 243(h) proceeding. However, no attempt was made to address the issue of the reviewing court's role in section 243(h) hearings, an issue which formed one ground for the decision of the Second Circuit. Rather, the

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[142]*See supra* notes 42, 72-74, 93, 97 & 105 and accompanying text.

[143]*See supra* note 73.

[144]*See supra* note 14.

[145]*Id.*

[146]Stevic v. Sava, 678 F.2d 401, 409 (2d Cir. 1982), *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). The court stated that "our obligation to assure observance of correct legal standards under this mandatory provision is to be contrasted with the more limited role of courts in reviewing BIA decisions under grants of discretionary authority . . . . " *Id.*

[147]*See supra* note 125.

[148]658 F.2d 1312 (9th Cir. 1981).

[149]*Id.* at 1316.

[150]INS v. Stevic, 52 U.S.L.W. at 4727 n.15.

Court seems to have concluded that the determination of eligibility is still entirely within the Attorney General's discretion.[151]

Leading up to the accession, Congress insisted that although no major changes need to be made to the existing laws, changes that did have to be made could be done simply within administrative applications and procedures.[152] Yet, the INS adhered to a "clear probability" standard. The view espoused by the Second[153] and Ninth[154] Circuits, that courts now play a broader role is arguably more reasonable. For if Congress now requires that the Attorney Genereal withhold deportation upon a showing of persecution, it follows that a reviewing court would have a duty to be certain that the Attorney General is applying the correct legal standard in determining eligibility for relief.[155] Taking this position, a court could not reasonably rely on a "caselaw consensus" developed during a time in which reviewing courts deferred to the Attorney General's determination.[156]

Although the Supreme Court did not rely on the holdings of past cases for its determination, it did note that prior to 1980 many courts and administrative decisions supported the clear probability standard.[157] The Court implicitly rejected the proposition that after 1980 the courts were granted an increased scope of review by the elimination of discretion under amended section 243(h).[158] Therefore, the Court failed to adequately analyze the effect of the 1980 Act on case law developed under prior law.

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[151]*Id.*

[152]*See supra* notes 98-99 and accompanying text.

[153]Stevic v. Sava, 678 F.2d 401 (1982), *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[154]McMullen v. INS, 658 F.2d 1312 (1981).

[155]*See supra* note 146.

[156]However, this was the view espoused by the Third Circuit in Rejaie v. INS, 691 F.2d 139 (1982). In *Rejaie*, the Third Circuit relied heavily on the BIA's decision in *In re* Dunar, 14 I. & N. Dec. 310 (1973), and a Seventh Circuit Court of Appeals decision, Kashani v. INS, 547 F.2d 376 (7th Cir. 1973), to find a case law consensus equating clear probability with well-founded fear. *Rejaie*, 691 F.2d at 143. Both *Dunar* and *Kashani* were decided before 1980 and they are similar in reasoning. The tribunal in each case found that because the Protocol and the clear probability standard both required objective evidence of persecution, the standard under the Protocol, well-founded fear, and the clear probability test were not substantially different. In *Rejaie*, the court also noted that since the enactment of the Refugee Act of 1980, the BIA has continued to use "clear probability" and "well-founded fear" interchangeably to label the alien's burden of proof. 691 F.2d at 145 (citations omitted). The Third Circuit, therefore, based its holding that well-founded fear is equivalent to clear probability on a case law consensus *developed under prior law* and upon a statement of the INS that the Board continues to follow this consensus *despite* the 1980 amendments.

[157]INS v. Stevic, 52 U.S.L.W. at 4727.

[158]*See supra* notes 144-51 and accompanying text.

A broader scope of review would call for greater judicial scrutiny of the standards used by the Attorney General in making his determinations. By summarily dismissing any possibility that the Attorney General no longer has any discretion in determining whether an alien is eligible for relief, the Supreme Court has, arguably, relied on an area of case law which deserves little weight.

2. Interpretations of Congressional Intent.—In reviewing the Congressional Reports that preceeded the adoption of the Refugee Act of 1980, the Supreme Court conceded that the Act was merely an attempt to clarify the then-existing immigration law. In a note, the Court quotes the same language the Third Circuit Court of Appeals relied on in *Rejaie*[159] to hold that the language of section 243(h) was amended by the 1980 Act merely to conform it to the Protocol—"for the sake of clarity."[160] Yet, the Supreme Court oversimplifies the legislative intent in amending section 243(h).

The Second Circuit in *Stevic* acknowledged the ambiguity found in expressions of congressional intent. Statements seemed to indicate that no major changes need be made to immigration law, that the amendments were made for the sake of clarity alone. However, the reports go on to note that even if changes need be made, they can be accomplished through administrative procedures.[161] Upon a close examination, congressional understanding and intent are more ambiguous than represented by the Supreme Court in *Stevic*.

In stating that no major changes were needed, Congress seemed to assume that the protection afforded under the Protocol had always been the same as that under section 243(h).[162] One report stated that amended section 243(h) "is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."[163] It is conceivable that Congress foresaw no major changes

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[159]691 F.2d 139 (3d Cir. 1982).

[160]52 U.S.L.W. at 4729 n.20 (quoting H.R. REP. No. 608, 96th Cong., 2d Sess. 17-18 (1979).

[161]*See supra* notes 98-99 and accompanying text.

[162]Support for this conclusion could be drawn from a statement made prior to the accession to the 1967 Protocol: "Even though the United States already meets the standards of the Protocol, formal accession would greatly facilitate our continuing diplomatic effort to promote higher standards of treatment for refugees . . . ." S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 7 (1968) *quoted in In re* Dunar, 14 I. & N. Dec. 310, 315 (1973).

[163]H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 20 *reprinted in* 1980. U.S. CODE CONG. & AD. NEWS 161, *quoted in* Stevic v. Sava, 678 F.2d at 408 (2d Cir. 1982), *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). *See also* S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 6 (1968): "The deportation provisions of the Immigration and Nationality Act, *with limited exceptions*, are consistent with this concept [of the Protocol]. The Attorney General *will be able* to administer such provisions in conformity with the Protocol without amendment of the Act." *Id. quoted in In re* Dunar, 14 I. & N. Dec. at 317 (emphasis added).

in the immigration laws and procedures and thus intended to rubber stamp the standard of clear probability already in use.[164] Conversely, Congress might have intended to leave the matter of conformity within the power of reviewing courts and agencies, to assure that procedures and regulations implementing the immigration laws be harmonized with the Protocol.[165] This list of possibilities is not exhaustive, yet the Supreme Court too quickly glides over the ambiguities in arriving at its conclusion that Congress did not intend for any changes in administrative practice to occur.[166]

3. The Meaning of Clear Probability.—The Court began its analysis by noting that prior to 1968, "it was clear that an alien was required to demonstrate a 'clear probability of persecution' or a 'likelihood of persecution' in order to be eligible for withholding of deportation under § 243(h) . . . ."[167] The Court also pointed out that under section 203(a)(7) an alien seeking admission to the United States had "to establish a good reason to fear persecution."[168]

Noting that many courts generally continue to apply a standard of clear probability even after accession to the Protocol in 1967,[169] the Supreme Court determined that the Refugee Act of 1980 made no mention of the standard of proof required by the statute. "To the extent such a standard can be inferred from the bare language of the provision, it appears that a likelihood of persecution is required . . . . The section literally provides for withholding of deportation only if the alien's life or freedom 'would' be threatened in the country to which he would be deported; it does not require withholding if the alien 'might' or 'could' be subject to persecution."[170] The Court determined that nothing in amended sec-

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[164]*See* H.R. REP. No. 608, 96th Cong., 1st Sess. 18 (1979): "Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention." Significantly however, Congress did *not* take note, that prior to the amendment, the discretionary authority vested in the Attorney General caused the courts to view their role as very limited.

[165]*See supra* note 163. The oddity that both of these conclusions can be made from the same statement lends further support to the conclusion in *Stevic* that congressional intent was ambiguous. *See* Stevic v. Sava, 678 F.2d at 408, *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[166]Yet even finding, that Congress did not contemplate major changes in section 243(h) or its application, does not preclude the natural evolution in construction and application of the statute. Congress did not countermand adjustments in the immigration law to take into account the amendments to section 243(h). Rather, Congress seems to have relied on the natural functions of the executive and judicial branches to assure that the substantive part of the law, whether or not it was facially changed, conformed to the Protocol. *See supra* note 163.

[167]INS v. Stevic, 52 U.S.L.W. at 4726 (U.S. June 5, 1984) (No. 82-973).

[168]*Id.* (citation omitted).

[169]*Id.* at 4727.

[170]*Id.* at 4727-28 (footnote omitted).

tion 243(h) "indicate[d] any diminution in the degree of certainty with which [grounds for withholding deportation] must be established."[171]

In maintaining the standard at its pre-1980 level, the Court explained that it was trying to avoid stating *any* standard.[172] Yet, the Court did state its definition of "clear probability"; the Court found that the question involved under clear probability is whether "it is more likely than not that the alien would be subject to persecution."[173] The Court determined that the word "clear" is just surplusage, and ought not to be construed as causing the clear probability standard to lean closer to a clear and convincing standard.[174]

At first glance, the Supreme Court appears simply to have reaffirmed past decisions, both on the judicial and administrative levels, requiring an alien to establish a "clear probability" of persecution. Yet, a closer examination reveals that the Court *did* establish a new standard of proof. That is, to receive section 243(h) relief, an alien must support his application with "evidence establishing that it is *more likely than not* that the alien [will] be subject to persecution on one of the specified grounds."[175]

The Court found no merit in the contention that a clear and convincing standard had been applied by the BIA. However, inherent in its definition lies an apparent concern with clarifying the standard.[176] Although arguably a more likely than not standard of definition of clear probability, it does provide further guidance to a court tempted to require more than a probability of persecution. Requiring an alien to establish that it is more likely than not that he will be subject to persecution may indeed not be any different than requiring a showing of clear probability, at least in theory. Yet in practice, it is believed that the new standard of more likely than not will not only produce more reasonable and equitable results for aliens seeking section 243(h) relief, but it will also prove much simpler to apply.

4. The Impact of the Supreme Court's Interpretation on Section 243(h) Claims.—By defining the clear probability standard as it is to be applied in section 243(h) applications,[177] the Supreme Court has, arguably, established a new standard, a standard which is reasonable and workable. Because of the factual situations and the arguments facing the Court, however, the language used in reversing the Second Circuit's decision could mislead many courts.

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[171] *Id.* at 4727 n.15.

[172] *Id.* at 4730. The Court stated: "We have deliberately avoided any attempt to state the governing standard beyond noting that it requires that an application be supported by evidence establishing that it is *more likely than not* that the alien would be subject to persecution on one of the specified grounds." *Id.* (emphasis added).

[173] *Id.*

[174] *Id.* at 4728 n.19.

[175] *Id.* at 4730 (emphasis added).

[176] *Id.* at 4728 n.19.

[177] *See supra* notes 167-76 and accompanying text.

For example, the Supreme Court interpreted the Second Circuit's decision as holding that an alien need only show a well-founded fear of persecution.[178] In reality, however, the Second Circuit did *not* hold this. Rather, it determined that the changes in section 243(h), brought about by the Refugee Act of 1980, required a showing "far short of a 'clear probability'."[179] In fact, the Second Circuit recognized the improvidence in attempting to define a more detailed standard, determining that any standard must be developed in the context of "concrete factual situations."[180] The Second Circuit never determined that a "well-founded fear" standard should replace the "clear probability" standard when granting section 243(h) relief.[181]

In his arguments to the Supreme Court, it appears that Stevic argued in favor of the well-founded fear standard.[182] However, the Court determined that well-founded fear was a more generous standard and recognized no basis for change from a clear probability standard. As previously noted though, implicit in the Court's attempt to clarify the meaning of clear probability is the recognition of the ambiguity surrounding this section that has plagued the courts since the accession to the 1967 Protocol.

V. Calling on Congress—The Need for Reform.

The Immigration Reform and Control Act of 1983 is currently before Congress. This bill would revamp our nation's immigration laws.[183] The proposed legislation is an accumulation of years of research by various committees within both the executive and legislative branches.[184] It is also a recognition by Congress of the need to promote the national interest while at the same time maintaining the United States' policy of "traditional hospitality and charity."[185]

The purpose of the proposed legislation is to reform the process for determining the validity of political asylum requests; make limited changes in the system for legal immigration; and to provide a controlled legalization of status program for certain undocumented aliens who have entered the United States prior to 1982.[186] Much of this "reform" concerns asserting control over illegal immigrants. One aspect of this control is to place

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[178]52 U.S.L.W. at 4725 (U.S. June 5, 1984) (No. 82-973).

[179]Stevic v. Sava, 678 F.2d 401, 409, *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (emphasis added).

[180]*Id.*

[181]52 U.S.L.W. at 4725 (U.S. June 5, 1984) (No. 82-973).

[182]*See id.*

[183]At the time of this writing, the Senate version of the Act had been passed in the Senate. (S. 529). Its companion bill in the House (H. Bill 1510) was currently awaiting passage by the House.

[184]*See* H. Rep. No. 115, 98th Cong., 1st Sess., 30-32 (1983).

[185]S. Rep. No. 62, 98th Cong., 2d Sess. 3 (1983).

[186]*See* H. Rep. No. 115, 98th Cong., 1st Sess., 30-32 (1983).

stiff penalties on employers who take advantage of the inexpensive labor illegal immigrants provide.[187]

The Immigration Reform and Control Act of 1983, if passed, would provide some procedural efficiency in the administrative process.[188] The proposed bill expressly amends section 243(h) by adding paragraph 3 to read that "application for relief under this subsection shall be considered to be an application for asylum under section 208 and shall be considered in accordance with the procedures set forth in that section."[189] Yet neither the proposed legislation nor the congressional statements surrounding the legislation do much to clear up the ambiguities that in the past surrounded the proper burden of proof required for section 243(h) eligibility.

A House report accompanying the House version of the bill repeats the ambiguities that caused courts to reach different conclusions. It states: "The Committee is convinced that nothing in the present law, nor in the Committee Amendment, should be construed as providing *less* protection than the Protocol."[190]

The degree of protection the 1967 Protocol was intended to afford aliens remains questionable. The conclusion reached by the Second Circuit in *Stevic v. Sava*,[191] that conformity to the 1967 Protocol did indeed necessitate administrative changes, seems to comport more closely with statements made by Congress expressing its belief that although no *major* changes were required, our laws provided the flexibility needed in carrying out the principles found in the Protocol. This flexibility was recognized by the Supreme Court, as evidenced by its definition of clear probability that an alien must establish persecution as more likely than not.[192] A more likely than not standard guarantees that the protection afforded by our existing laws will not be less than that found in the Protocol.

However, the same House report states an apparently conflicting interpretation:

> That is, the Committee views the Protocol as creating no substantive or procedural rights not already existing either under current law or under the law as modified by the [bill]. The Committee thus agrees with the holding in *Pierre v. United States*, 547 F.2d 1281, 1288 (5th Cir. 1977) wherein it is stated that "accession to the Protocol by the United States was neither intended to nor had the effect of substantially altering the statutory immigration scheme."[193]

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[187]*Id.*

[188]*See infra* note 192.

[189]H.R. 1510 98th Cong., 2d Sess. § 124(b) (1983).

[190]H.R. No. 115, *supra* note 186, 59 (emphasis added).

[191]678 F.2d 401 (2d Cir. 1982), *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[192]INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

[193]H.R. No. 115, *supra* note 186, 59.

This statement appears to support the conclusion that any changes wrought by the Refugee Act of 1980 were merely "cosmetic surgery"[194] and that Congress, in performing this "cosmetic surgery," believed the procedures and case law involving the immigration laws had always conformed to the Protocol.[195] Yet, as *Stevic* points out, no *substantial* changes in our laws are necessary to afford aliens the *protection* contemplated by Congress in acceding to the Protocol.[196]

Congress seems unwilling, once again, to deal clearly with the perplexing issues surrounding the asylum-type relief found in section 243(h) and the 1967 Protocol. Thus, courts will continue to shoulder the task of trying to sort these issues and apply a proper burden of proof to the alien seeking withholding of deportation. This increases the importance and the potential impact of the decision reached by the United States Supreme Court.

VI. Conclusion

The United States has often welcomed large numbers of aliens who enter this country for a variety of reasons. We have prided ourselves in providing a place for those who seek freedom, or a refuge from political strife and oppression. At the same time, however, conflicting concerns have led to limits on immigration. The development of United States immigration law has been influenced by an attempt on the part of the three branches of government to balance these conflicting concerns and to arrive at a generous yet fair set of laws. This is not an easy task. The struggle that often arises between humanitarian and protectionist goals was evidenced by the failure of all three branches to state the burden of proof an alien must shoulder under section 243(h) in order to escape deportation to a country where his life or freedom might be threatened.[197]

The Protocol and the Refugee Act of 1980 did little to clarify congressional intent regarding the proper burden of proof in a section 243(h) proceeding. Furthermore, the proposed Immigration Reform and Control Act of 1983 provides virtually no guidance to those aliens seeking relief under section 243(h). Without clear guidance from Congress, it is crucial that the courts accept the responsibility of interpreting the Supreme Court's definition of the burden of proof under section 243(h) in a manner that

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[194]*Rejaie*, 691 F.2d 139, 146 (3d Cir. 1982).

[195]*Id.* at 143.

[196]52 U.S.L.W. at 4726.

[197]Each branch of government could adequately deal with the matter. For example, Congress might take a closer look at the problem of the alien's required burden of proof and *then* unambiguously articulate its intent. The Executive might require uniformity within its discretionary power of setting standards. Finally, the courts could establish a flexible, yet uniform standard that will parallel our nation's humanitarian ideals—so fundamental to our government—and produce an impartial, fair result.

preserves the humanitarian principles that have always made the United States a haven to those fleeing persecution. This cannot be accomplished if the courts adhere to archaic legal principles, developed in an era when the courts had a very limited ability to review the Attorney General's decisions under section 243(h).

Adopting the construction of clear probability similar to the one given it prior to 1980 will only undermine the humanitarian principles expressed by the executive branch of the United States government. Rather, courts should follow the lead of the Supreme Court in *Stevic*[198] and reaffirm those values that the United States has espoused for over two hundred years.

SHAUN KATHLEEN HEALY

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[198]INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

Foreign Application of the *Noerr-Pennington* Doctrine After *Coastal States Marketing v. Hunt*

I. Introduction

United States businesses operating abroad have long recognized that they can profit from lobbying foreign governments just as they can gain a competitive advantage from successfully petitioning Congress, the executive branch, numerous administrative agencies, and the courts. Domestic lobbying by American and foreign businesses and their trade associations can, when successful, have an adverse effect on competition. In some cases, this governmental petitioning is undertaken solely to achieve an anticompetitive effect. Although a demonstrable restraint of trade may result, such petitioning activity is immune from domestic antitrust liability under the Sherman Act[1] because of the judicially created exception to antitrust laws known as the *Noerr-Pennington* doctrine.[2]

When American businesses operating abroad jointly petition foreign governments for the purpose of gaining a competitive advantage, and a substantial anticompetitive effect on trade within the United States results, their antitrust liability is uncertain. If petitioning activities by United States corporations directed at foreign governments are treated the same as petitioning directed at a branch of the United States government, then the *Noerr-Pennington* doctrine would render foreign petitioning immune from antitrust liability. The Supreme Court has never addressed the issue, but two circuit courts have done so and have arrived at conflicting decisions.[3]

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[1]15 U.S.C. §§ 1-7 (1982).

[2]The doctrine takes its name from Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965). *See generally* 1 P. Areeda & D. Turner, Antitrust Law ¶¶ 201-204 (1978) [hereinafter cited as Areeda & Turner]; J. Atwood & K. Brewster, Antitrust and American Business Abroad § 8.12 (1981) [hereinafter cited as Atwood & Brewster]; 1 W. Fugate, Foreign Commerce and the Antitrust Laws § 2.28 (3d ed. 1982) [hereinafter cited as Fugate]; Costilo, *Antitrust's Newest Quagmire: The* Noerr-Pennington *Defense*, 66 Mich. L. Rev. 333 (1968); Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication Before Administrative Agencies and Courts—From* Noerr-Pennington *to* Trucking Unlimited, 29 Wash. & Lee L. Rev. 209 (1972); Comment, *Antitrust Immunity: Recent Exceptions to the* Noerr-Pennington *Defense*, 12 B.C. Ind. & Com. L. Rev. 1133 (1971); Note, *Corporate Lobbyists Abroad: The Extraterritorial Application of* Noerr-Pennington *Antitrust Immunity*, 61 Calif. L. Rev. 1254 (1973) [hereinafter cited as Note, *Corporate Lobbyists Abroad*]; Note, *Antitrust: The Brakes Fail on the* Noerr *Doctrine*, 57 Calif. L. Rev. 518 (1969); Note, *Limiting The Antitrust Immunity For Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 Harv. L. Rev. 715 (1973); Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 Harv. L. Rev. 847 (1968).

[3]*Compare* Coastal States Mktg. v. Hunt, 694 F.2d 1358 (5th Cir. 1983) (*Noerr-Pennington* does apply to foreign petitioning) *with* Occidental Petroleum Corp. v. Buttes

Their contradictory positions are the subject of this Note, which examines the rationales of the circuits in light of the development of the *Noerr-Pennington* doctrine.[4] A brief discussion of the Sherman Act precedes an examination of this exception to the antitrust laws.[5] This Note will demonstrate why the more recent view, that the *Noerr-Pennington* doctrine applies beyond the territorial confines of the United States, is the better view,[6] and why the Justice Department's Antitrust Guide for International Operations should be expanded to explain how the *Noerr-Pennington* doctrine operates when applied abroad.[7]

II. The Sherman Act and Extraterritorial Jurisdiction

Individuals and businesses are prohibited from restraining or monopolizing trade in the United States by the Sherman Act,[8] the first of the United States' antitrust laws.[9] The Sherman Act was passed in 1890 and was aimed at eliminating the various monopolies and combinations in restraint of trade that threatened economic competition in the nineteenth century.[10]

Section 1 of the Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[11] Terms of crucial importance, such as "restraint" and "commerce," were undefined in the Act and were left to the courts to construe.[12] What was clear in Section 1 was that individual conduct was not prohibited; a violation required two or more persons in order to find the contract, combination, or conspiracy that was prohibited.[13]

Unlike the first section, Section 2 of the Sherman Act reaches the conduct of individuals and is directed towards "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ."[14] Section 1 and Section 2 are complementary in that the former is directed at the means of anticompetitive conduct—combinations in restraint of trade—

Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir. 1972) (*Noerr-Pennington* does not apply to foreign petitioning).

[4]*See infra* notes 181-266 and accompanying text.

[5]*See infra* notes 8-34 and accompanying text.

[6]*See infra* notes 267-89 and accompanying text.

[7]*See infra* note 290 and accompanying text.

[8]15 U.S.C. §§ 1,2 (1982).

[9]J. Townsend, Extraterritorial Antitrust: The Sherman Antitrust Act and U.S. Business Abroad 26-27 (1980) [hereinafter cited as Townsend].

[10]*Id.* at 29.

[11]15 U.S.C. § 1 (1982).

[12]Townsend, *supra* note 9, at 34.

[13]*Id.*

[14]15 U.S.C. § 2 (1982).

while the latter prohibits the goal of such conduct—monopolization.[15] Violations of Section 2 take three forms: monopolizations, attempts to monopolize, and conspiracy to monopolize. As a general rule, Section 2 is violated when one person or a combination of persons possesses monopoly power, or attempts to gain monopoly power, and has the intent and purpose to exercise that power.[16]

The broad statutory language of the Sherman Act has acquired more precise definition in the courts over the last ninety years. Certain types

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[15]Standard Oil Co. v. United States, 221 U.S. 1, 61-62, (1911); *see* J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 26 (1963).

[16]TOWNSEND, *supra* note 9, at 35. More specifically, it is important to note that Section 2, by its terms, does not prohibit monopolies "in the concrete." Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911). Rather, Section 2 prohibits the act of "monopolization," which requires that the defendant (1) have monopoly power (2) in the relevant market (3) with the intent or purpose of exercising such power.

Monopoly power exists when the defendant has obtained "control of price or competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393 (1956). Such control would be present if the defendant were able to charge a higher price than would be set by competition or to exclude competitors from the market. The defendant need not have obtained monopoly power by means which would violate Section 1 of the Sherman Act in order to be held in violation of Section 2. *Standard Oil*, 221 U.S. at 61.

The relevant market in which the defendant possesses monopoly power has two components. The first is the product market. In defining the relevant product market in the *du Pont* case, the Supreme Court stated that one must make

> an appraisal of the "cross-elasticity" of demand in the trade. . . . In considering what is the relevant [product] market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal.

351 U.S. at 394-95 (footnote omitted).

The second component of the relevant market is the geographic market. The relevant geographic market may be broad or narrow: "[I]n addition to the principal national market, there may well be local markets of limited territorial area, or city markets, which in other litigation might be found in themselves to constitute, for purposes of the antitrust laws, definable, separate markets, wherein . . . prohibited monopolization . . . might be enjoined or punished." United States v. Grinnell Corp., 236 F. Supp. 244, 253 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

The final element of monopolization is the intent or purpose to exercise the monopoly power. Specific intent to monopolize is not required, "for no monopolist monopolizes unconscious of what he is doing." United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945) (Hand, J.), *quoted in* American Tobacco Co. v. United States, 328 U.S. 781, 814 (1946). Rather, the intent to exercise monopoly power may be inferred from the conduct of the defendant in obtaining or maintaining monopoly power by practices that are an unreasonable restraint of trade, *see Standard Oil*, 221 U.S. at 70-77, or by other exclusionary practices that do not themselves rise to the level of a Section 1 violation, *see Aluminum Co. of America*, 148 F. Supp. at 431-32.

The standard formulation for attempts to monopolize is "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it." *American Tobacco*, 328 U.S. at 785 (quoting and approving jury instructions given in the district court).

of agreements have come to be regarded as illegal per se under Section 1 of the Act.[17] These include agreements to allocate territories,[18] agreements among competitors to fix the prices at which their products are sold,[19] collective refusals to deal and group boycotts,[20] tying arrangements,[21] and agreements to exclude competitors.[22] The reason for the per se rule is that

> [a]lthough [Section 1 of the Sherman Act] is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition.
>
> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[23]

Restraints that fall outside the per se rule are subject to a full factual inquiry to determine "whether they will have any significantly adverse effect on competition, what the justification for them is, and whether that justification could be achieved in a less anticompetitive way."[24] This inquiry is the "rule of reason" which has been a part of antitrust adjudication since 1911.[25]

Actions to enforce the Sherman Act may be either criminal or civil. Violations of Sections 1 and 2 are, when prosecuted by the government,

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[17]TOWNSEND, *supra* note 9, at 38.

[18]United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

[19]United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[20]Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457 (1941).

[21]Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

[22]International Salt Co. v. United States, 332 U.S. 392 (1947).

[23]*Northern Pac. Ry. Co.*, 356 U.S. at 5 (citations omitted).

[24]Department of Justice, Antitrust Division, *Antitrust Guide for International Operations*, (Jan. 26, 1977), *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (Feb. 1, 1977) [hereinafter cited as *Antitrust Guide for International Operations*].

[25]The rule of reason test was first applied in Standard Oil Co. v. United States, 221 U.S. 1.

felonies.[26] Upon conviction, a corporate violator may be fined up to one million dollars; the maximum punishment for other persons is a fine of up to one hundred thousand dollars, or three years imprisonment, or both.[27]

Section 4 of the Clayton Act[28] authorizes suit in the United States district courts by any person harmed in his business or property by an act in violation of the antitrust laws.[29] Section 4 also mandates the recovery of treble damages and the cost of litigation, including reasonable attorneys' fees.[30]

Sections 1 and 2 of the Sherman Act prohibit joint restraints or the monopolizing of "trade or commerce . . . with foreign nations."[31] The statutory language indicates that the antitrust law was drafted to reach international trade activities. Yet, the regulation of international business activity that occurred outside United States territory raised serious questions of jurisdiction. Originally, courts applied a territorial limitation to the application of United States antitrust laws, denying jurisdiction when the acts complained of occurred outside the borders of the United States.[32] Eventually, courts turned from a strictly territorial view of jurisdiction to one that focused less on the place where the allegedly anticompetitive conduct occurred and more on the effects that conduct, outside United States territory, had on competition within the country. Professor Townsend has stated the modern general rule of the antitrust laws' foreign jurisdiction: "The law pertains extraterritorially only to activities, no matter where performed, that directly and substantially affect the foreign trade of the United States."[33] In the view of the Justice Department, "the U.S. antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; and, consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations."[34]

III. Foreign Sovereign Involvement and Antitrust Defenses

The foreign sovereigns of nations in which United States corporations do business have become integrally involved in matters of international

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[26]15 U.S.C. §§ 1, 2 (1982).

[27]*Id.*

[28]15 U.S.C. § 15(a) (1982).

[29]*Id.*

[30]*Id.*

[31]15 U.S.C. §§ 1, 2 (1982).

[32]Townsend, *supra* note 9, at 42-43 (citing American Banana Co. v. Unified Fruit Co., 213 U.S. 347, 356-57 (1909).

[33]Townsend, *supra* note 9, at 85.

[34]*Antitrust Guide for International Business Operations*, *supra* note 24, at E-2 to E-3 (footnote omitted).

trade.[35] Some do so by interfering directly in competitive markets to promote their domestic employment, to increase income, or to elevate the public welfare.[36] Occasionally, the official activities of foreign sovereigns have an adverse effect on commerce within the United States.[37] When a foreign sovereign's activities occur with the cooperation of, or in conjunction with, United States businesses operating abroad, the businesses involved may face antitrust consequences in United States courts. American courts have the power to determine liability for Sherman Act violations which have occurred abroad, provided that the activity complained of has a substantial effect on commerce in the United States.[38]

The involvement of foreign sovereigns in international business complicates antitrust enforcement and litigation.[39] When American businesses have acted in conjuction with foreign governments to violate United States antitrust laws, it is likely that, as defendants, those businesses will challenge a United States court's exercise of jurisdiction through affirmative defenses, such as the doctrines of sovereign compulsion[40] and act-of-state.[41] Both of these doctrines were originally developed in areas of the law other than antitrust; but today, both are used in antitrust litigation to defeat liability in some extraterritorial antitrust cases.[42] In addition, defendants may call on consideration of comity to foreign governments to avoid inquiry into antitrust liability.[43] It is in this manner that the *Noerr-Pennington* doctrine is interjected into some extraterritorial antitrust litigation.

A. Sovereign Compulsion

Sovereign compulsion operates when the defendant's activities were performed pursuant to an official command of a foreign government.[44] For example, if the government of one nation prohibits businesses

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[35]*See* TOWNSEND, *supra* note 9, at 82-83.

[36]D. Baker, *Sovereign Compulsion, The* Noerr *Doctrine and Government Cartelizing*, in SEVENTEENTH ANNUAL ADVANCED ANTITRUST LAW SEMINAR: INTERNATIONAL TRADE AND THE ANTITRUST LAWS, 95 (1977) [hereinafter cited as Baker].

[37]*Id.* at 97.

[38]*See generally* AREEDA & TURNER, *supra* note 2, ¶ 236. One example arises when foreign governments directly cartelize a world market as a political act, as in the case of OPEC, where the impact on the United States market is great. *See* Baker, *supra* note 36, at 107.

[39]*See generally* AREEDA & TURNER, *supra* note 2, ¶ 235.

[40]*See* Baker, *supra* note 36, at 98.

[41]*See* Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100 (1967); Note, *The Development of the Defense of Foreign Compulsion*, 69 MICH. L. REV. 888 (1971).

[42]*See, e.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347; Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

[43]*Antitrust Guide for International Operations*, *supra* note 24, at E-3.

[44]The doctrine, also known as "force majeure," generally exempts a private party from performing dutes that it would normally be required to perform. The doctrine will not apply unless the government-compelled acts or omissions took place in the government's

operating in that country from exporting a scarce commodity to the United States, and the defendant complies with the order, he would not be liable for any resultant trade restraint within the United States.[45] The doctrine of sovereign compulsion would provide the defendant with protection even if he complied with the sovereign's mandate with an intent to restrain trade or eliminate competition in the United States.[46] The doctrine is premised on the respect for the sovereignty of foreign nations and the belief that businesses should not be held liable for conduct that was compelled by the sovereign of another country.[47] For the doctrine to apply, the foreign government's mandate must be compulsory, not merely permissive.[48]

B. Act-of-State

The traditional statement of the act-of-state doctrine was made by Chief Justice Fuller of the Supreme Court in *Underhill v. Hernandez*:[49] "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[50]

The act-of-state doctrine, like that of sovereign compulsion, is based on the concept of sovereign immunity.[51] The doctrine holds that United States courts will not examine the validity of the acts of a foreign sovereign, especially when those acts occur in the foreign territory. The act-of-state doctrine was premised on a belief in mutual respect between equal nations.[52] This respect meant that one state would not interfere with the internal exercises of another's sovereign power. Whether foreign exercises of the governing power are invalid, or are the result of bad motivation, are questions to be determined within that other country.[53]

Although United States courts have adhered to the act-of-state doctrine since the *Underhill* decision, the reasons for this adherence have

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own territory. Baker, *supra* note 36, at 98; *see also*, FUGATE, *supra* note 2, § 2.27; ATWOOD & BREWSTER, *supra* note 2, § 8.14.

[45]The example assumes that the defendant's compliance occurs in the foreign country.

[46]Graziano, *supra* note 41, at 132. The author explains that irrespective of a private illegal intent, the anticompetitive actions would be directly attributable to the sovereign since commanded by him. *Id.*

[47]*Id.*

[48]*Id.* at 133-38. "Today it is clear that a businessman may do no more than what is required by foreign legislative mandate if he is to claim antitrust immunity." *Id.*

[49]168 U.S. 250 (1897).

[50]*Id.* at 252.

[51]Norton, *Reflections on the Act of State Doctrine, A Fifth Wheel in Conflict of Laws*, 10 HOUS. L. REV. 1, 2 (1972).

[52]*See*, Underhill v. Hernandez, 168 U.S. 250 (1897), in which the Court explained that redress of grievances by reason of acts of a sovereign state must be achieved "through the means open to be availed of by sovereign powers as between themselves." *Id.* at 252.

[53]*See American Banana*, 213 U.S. at 358.

changed. Originally based on sovereignty and comity, the doctrine was primarily used in expropriation cases.[54] Occasionally, it was applied in antitrust actions. One of the most significant of those early antitrust cases was *American Banana Co. v. United Fruit Co.*[55] There, the Supreme Court held that the complaint did not state a cause of action under the Sherman Act because the acts complained of occurred outside the United States and were legal under the laws of the country where they were committed.[56] Justice Holmes, writing for the majority, relied, in part, on the act-of-state doctrine: "[A] seizure by a state is not a thing that can be complained of elsewhere in the courts."[57] The Court stated that

> it is a contradiction in terms to say that within its jurisdction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.[58]

In effect, the Court held that successful petitioning of a foreign sovereign was protected from antitrust liability because it resulted in official governmental action that the American courts would not judge.

The act-of-state doctrine was applied somewhat mechanically in *American Banana*. Its application was modified and became more flexible after the Supreme Court decided *Banco National de Cuba v. Sabbatino*[59] in 1964. In that case, Justice Harlan explained that neither international law, nor sovereignty, nor the United States Constitution mandated the act-of-state doctrine.[60] Instead, it was the constitutionally based concept of the separation of powers that required courts to decline from examining the validity of a foreign sovereign's acts.[61] Such an inquiry could cause embarrassment if, for example, an American court held invalid an expropriation by a foreign state while the Executive was trying to soothe a volatile diplomatic situtation with the same nation. Since the Constitution assigns foreign affairs to the political branches, the Court

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[54]*See, e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918).

[55]213 U.S. 347 (1909). For a review of the facts of this case, *see infra*, text accompanying notes 147-55.

[56]*Id.* at 354-55.

[57]*Id.* at 357-58 (citing Underhill v. Hernandez, 168 U.S. 250).

[58]*Id.* at 358 (citation omitted).

[59]376 U.S. 398 (1964).

[60]*Id.* at 421, 423.

[61]*Id.* at 423.

in *Sabbatino* announced that it would not look into the validity of a seizure of American property in Cuba.[62]

The important result of *Sabbatino's* shift in emphasis was the emergence of a much less rigid doctrine. A "balance of relevant considerations" was to be made before courts would hear cases involving the domestic effect of a foreign government's passage of legislation of rule.[63] If those considerations did not indicate a serious need to stay a court's exercise of jurisdiction, it would be possible to decide a case which in some way involved the act of another sovereign. In *Sabbatino*, the Supreme Court made it clear that the act-of-state doctrine was not jurisdictional.[64]

In antitrust cases, the act-of-state defense is invoked in two ways: The first occurs when the plaintiff charges that one exercising the delegated power of a foreign sovereign participated in some anticompetitive activity that significantly affected United States commerce; the second occurs when the plaintiff alleges that the defendant induced a foreign sovereign to take official action that results in a restraint of trade in the United States.[65] The act-of-state doctrine has been a successful defense in several antitrust cases, but some exceptions have also developed.[66] For example, inducement that is illegal is not protected by the doctrine,[67] nor is inducement to take purely commercial action on the part of the foreign sovereign.[68] American courts have the power to hear cases which involve consideration of the official acts of foreign sovereigns and cases which involve attempts by private firms to persuade a foreign sovereign to enact legislation with an anticompetitive effect. Usually, American courts will allow

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[62] *Id.* at 433.

[63] *Id.* at 428. The Court stated:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

Id.

[64] *Id.*

[65] Hawk, *Act of State Doctrine,* Noerr-Pennington *Abroad, and Foreign Government Compulsion Defense*, 47 ANTITRUST L.J. 987, 992 (1978).

[66] *See, e.g.*, Bernstein v. N.V. Nederlandsche-Amerikaansche Stomvart-Maatschaapij, 173 F.2d 71 (2d Cir. 1949); Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

[67] *See, e.g.*, Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680, 690 (S.D.N.Y. 1979).

[68] *See, e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

the defense whenever the successful foreign petitioning which brought about the official act of a foreign government is at issue.

C. *The* Noerr-Pennington *Doctrine*

There are circumstances, however, where the antitrust defendant's conduct was not compelled by a foreign sovereign and was not taken in compliance with an official act of the foreign country.[69] One example is when the antitrust defendant has induced a foreign sovereign to take steps that adversely affect a business rival. For example, when Combination *A* persuades a foreign ruler to seize the property of Business *B*, nothing in Combination *A*'s conduct could be said to have been compelled or permitted by foreign actions. Assuming the effect of the seizure is that Business *B* is forced out of the export market, should Combination *A* be held liable for the restraint of trade in the United States caused in part at its instigation? The answer cannot be determined by resort to either the act-of-state doctrine or sovereign compulsion. It would appear that Combination *A* would be liable under the Sherman Act[70] unless the *Noerr-Pennington* doctrine is applied extraterritorially.

Since the development of the *Noerr-Pennington* doctrine in the 1960's,[71] antitrust laws have given special treatment to those defendants who conspired to restrain or brought about restraints on commerce through attempts to influence state and federal legislative,[72] administrative,[73] and judicial determinations.[74] Provided that their petitioning activity is not a sham,[75] antitrust defendants are immune from liability even if such activity has as its sole purpose a restraint of trade[76] or is part of a broader scheme[77] that violates the antitrust laws. Few commentators have examined the question whether the same immunity should extend to efforts to influence foreign governments.[78] An examination of the rationales underly-

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[69]Such conduct occurred in United States v. Sisal Sales Co., 274 U.S. 268 (1927), discussed *infra*, notes 170-79 and accompanying text. A complete discussion of the case is located in Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1266-67.

[70]15 U.S.C. §§ 1, 2 (1982).

[71]The doctrine was not entirely formulated during that decade, because it was not until 1972 that the Supreme Court ruled that the *Noerr-Pennington* doctrine also protected petitioning directed toward courts and adjudicatory agencies in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[72]Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (Pennsylvania legislature petitioned).

[73]United Mine Workers v. Pennington, 381 U.S. 657 (Secretary of Labor petitioned).

[74]*California Motor Transport*, 404 U.S. 508 (State licensing boards and courts petitioned).

[75]*Id.* at 511.

[76]*See* Alexander v. National Farmers Organization, 1982-2 Trade Cas. (CCH) ¶64,914 (8th Cir. 1982).

[77]381 U.S. at 670.

[78]*See, e.g.*, Davis, *Solicitation of Anticompetitive Action From Foreign Governments:*

ing the creation of the *Noerr-Pennington* doctrine is useful when considering whether foreign application of the doctrine is warranted.

IV. The *Noerr-Pennington* Doctrine

A. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.

The *Noerr-Pennington* doctrine was first defined in the Supreme Court's unanimous opinion in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[79] The *Noerr* controversy developed out of the intensely competitive long-distance freight hauling business in the eastern United States after World War II.[80] When long-distance truckers began to compete directly with railroads in the profitable long-haul trade, twenty-four eastern railroads and their trade association hired a New York public relations firm to develop a publicity campaign designed to promote legislation and public opinion advantageous to the railroads.[81] Forty-one Pennsylvania truckers and their trade association[82] filed an antitrust suit in the United States District Court for the Eastern District of Pennsylvania, charging that the railroads and their public relations firm had conspired to restrain trade and monopolize the long-distance freight business in violation of Sections 1 and 2 of the Sherman Act.[83] The complaint alleged that the railroads hired Carl Byoir and Associates to conduct a publicity campaign "designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers."[84] The truckers charged that the sole motivation behind the campaign was "to injure the truckers and eventually to destroy them as competitors in the long-distance freight business."[85]

The public relations method by which this objective was to be achieved was known as the "third-party technique," in which seemingly independent groups and individuals espoused the views of the railroads without disclosing that these apparently spontaneous comments were largely prepared by the railroads' public relations firm and paid for by the railroads.[86] The substantial efforts of Carl Byoir and Associates were

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Should the Noerr-Pennington *Doctrine Apply to Communications with Foreign Sovereigns?*, 11 Ga. J. Int'l Comp. L. 395 (1981) ; Note, *Corporate Lobbyists Abroad*, *supra* note 2.

[79]365 U.S. 127 (1961).

[80]*Id.* at 128.

[81]*Id.* at 129.

[82]The trade association involved was the Pennsylvania Motor Truck Association. *Id.*

[83]*Id.*

[84]*Id.*

[85]*Id.*

[86]*Id.* at 130. The third-party technique and activities were described in comprehensive

proven successful when the Governor of Pennsylvania vetoed the Fair Truck Bill which would have permitted trucks to carry heavier loads on Pennsylvania roads.[87]

The truckers won their treble damages antitrust suit in the district court.[88] The court found that (1) the railroads' publicity campaign had been malicious and fraudulent in its use of the third-party technique,[89] and (2) that the purpose of the publicity campaign had been to destroy the truckers' goodwill among the general public and their customers.[90] The railroads appealed and the Third Circuit Court of Appeals affirmed.[91] The Supreme Court granted certiorari.[92]

A unanimous Court, in an opinion written by Justice Black, reversed.[93] The Court based its holding on three grounds.[94] First, the Court looked to its holdings in *United States v. Rock Royal Co-op*[95] and *Parker v. Brown*[96] for the proposition that

> where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. . . . [U]nder our form of government the question whether a law . . . should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.[97]

Building on that construction, the Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[98] The

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detail by the Pennsylvania district court. Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 155 F. Supp. 768, 777-801 (E.D. Pa. 1957).

[87]365 U.S. at 130.

[88]*Noerr Motor Freight*, 155 F. Supp. 768.

[89]*Id.* at 816.

[90]*Id.*

[91]273 F.2d 218 (1959) (per curiam).

[92]362 U.S. 947 (1960).

[93]365 U.S. at 145.

[94]The three grounds generally recognized are: (1) the essential dissimilarity between petitioning activity and traditional Sherman Act violations; (2) the absence of any indication that Congress intended the Sherman Act to regulate political activity; and (3) the first amendment right to petition. A fourth ground, a corollary to the second and third, is that a representative democracy requires an unrestricted flow of information from the people to the government. *See id.* at 136-38.

[95]307 U.S. 533 (1939).

[96]317 U.S. 341 (1943).

[97]365 U.S. at 136 (footnote omitted).

[98]*Id.*

Court pointed out the "essential dissimilarity" between the conduct complained of in *Noerr* and activities traditionally prohibited by the antitrust laws.[99] As a related point, the Court noted that a contrary holding would "substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade,"[100] and would raise serious constitutional questions.[101] These considerations led the Court to hold that the Sherman Act did not apply to "mere solicitation of governmental action with respect to the passage and enforcement of laws."[102]

The final two grounds of the Court's holding express distinct, but closely related, ideas. The second ground is that a representative democracy requires information to flow freely from the constituent to the representative.[103] The Court held that the Sherman Act would not operate to block governmental access to information possessed by businesses simply because that information might persuade the legislature or executive to enact anticompetitive laws.[104] The Court recognized that to hold activity such as the railroads' publicity campaign violates the antitrust laws would "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act."[105]

The third ground embodied in the Court's holding is a complement to the second. That is, not only must government have unrestricted access to the opinions and desires of the people, but the people also have a guaranteed right to express themselves to their representative in government:

> [A] construction of the Sherman Act [that would forbid associations for the purpose of influencing the passage or enforcement of laws] would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.[106]

While the Court specifically stated in a footnote to its opinion that its view of the Sherman Act rendered it unnecessary to decide the first amend-

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[99] *Id.* at 136. The Court listed examples of the kinds of agreements the Sherman Act traditionally prohibits, including price fixing, boycotts, and market division. *Id.*

[100] *Id.* at 137.

[101] *Id.* at 138.

[102] *Id.*

[103] *Id.* at 137.

[104] *Id.* The Court explained that Congress and the states are free to enact anticompetitive legislation without violating the Sherman Act. *Id.* n.17.

[105] *Id.* at 137.

[106] *Id.* at 138.

ment question,[107] later cases developed which relied heavily on the first amendment underpinning of *Noerr*.[108]

Having determined that the Sherman Act did not apply to the "mere solicitation" of government action, the Court next discussed whether the railroads' anticompetitive purpose operated to take their activities outside the protection of the rule that political activity is beyond the scope of antitrust regulation.[109] The Court concluded that even if the railroads' sole purpose had been to destroy the truckers as competitors, such a purpose would be insufficient to transform otherwise lawful conduct into a violation of the Sherman Act.[110] Anticompetitive intent prompting petitioning activity was held not to constitute an antitrust violation.[111]

The Court also viewed the "third-party technique" as being clearly within the rule protecting political activity; and although the Court deplored the ethics of the technique, it remained outside the Sherman Act's reach.[112] Nevertheless, the Court warned that not all activity denominated as governmental petitioning would immunize actors from antitrust liaibility.[113] The Court said: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."[114] Although the "sham exception" did not come into play in *Noerr*, the Court's language provided the basis for its subsequent holding in *California Motor Transport Co. v. Trucking Unlimited*.[115]

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[107]*Id.* at 132 n.6. The Court noted: "The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment . . . . Because of the view we take of the Sherman Act, we find it unnecessary to consider any of these other defenses." *Id.*

[108]*See, e.g.*, First American Title Co. v. South Dakota Land Title Ass'n, 45 ANTITRUST & TRADE REG. REP. (BNA) 293 (8th Cir. 1983); United States v. Southern Motor Carriers Rate Conference, 1982-1 Trade Cas. (CCH) ¶64,659 (5th Cir. 1982); City of Kirkwood v. Union Elec. Co., 1982-1 Trade Cas. (CCH) ¶64,574 (8th Cir. 1982); International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1981); *In re* Airport Car Rental Antitrust Litig., 474 F. Supp. 1072 (N.D. Cal. 1979) (all interpreting the *Noerr-Pennington* doctrine as constitutionally based).

[109]365 U.S. at 138-40.

[110]*Id.* at 138-39.

[111]*Id.* at 140.

[112]*Id.* at 140-41. The Court stated: "Insofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity . . . ." *Id.* at 140.

[113]*Id.* at 144.

[114]*Id.*

[115]*See* 404 U.S. 508; *see infra* notes 134-51 and accompanying text.

B. United Mine Workers of America v. Pennington

The *Noerr* doctrine was enlarged four years later with the Supreme Court's opinion in *United Mine Workers of America v. Pennington*.[116] The Court held that concerted efforts to induce public officials to take action detrimental to competition was not a violation of the Sherman Act, even when it was part of a broader scheme that was itself a violation of the Act.[117] The antitrust allegations, made in a cross-claim, charged that the United Mine Workers and the large mining operators agreed to solve the coal industry's problem of overproduction by eliminating the smaller companies. The United Mine Workers agreed to abandon their efforts to control working time and to abandon their opposition to rapid mechanization in the mines. In exchange, the union was to receive higher wages for its members and larger payments by mine operators into the UMW welfare fund. The large mines and the union allegedly agreed that the union would impose the higher wage scale on all operators, including small ones, without regard for their ability to pay.[118]

In addition, the cross-claim alleged that the large mine operators had persuaded the Secretary of Labor to impose a minimum wage for coal miners working in mines that sold their product to the Tennessee Valley Authority (TVA).[119] It was also alleged that the conspirators discouraged the TVA from purchasing non-contract coal from small mines on the open market.[120] Independent of this petitioning activity, the large coal mines allegedly conspired to dump large tonnages of coal on the spot market to drive down prices and drive the small operators out of the market entirely.[121]

The jury's verdict for the small mine owner was overturned by the Supreme Court, in part because the efforts to influence the Secretary of Labor and the TVA were ruled protected by the *Noerr* doctrine.[122] The Supreme Court held that evidence introduced at trial regarding attempts to influence the Secretary of Labor and the TVA should have been excluded.[123]

Most of the initial commentary resulting from the *Pennington* decision focused on the Court's discussion of the labor exemption to antitrust law.[124] Yet, the Court's discussion of the *Noerr* doctrine was of equal

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[116]381 U.S. 657.

[117]*Id.* at 670.

[118]*Id.* at 659-60.

[119]*Id.* at 660.

[120]*Id.*

[121]*Id.* at 661.

[122]*Id.* at 670.

[123]*Id.*

[124]*See* Note, *Labor Law—Antitrust Law—Exemption of Labor Union from Sherman Act*, 7 B.C. IND. & COM. L. REV. 158 (1965); Note, *When Do Union Agreements with*

importance. *Pennington* added much to the definition of antitrust immunity for government petitioning first established in *Noerr*. Unlike the conduct in *Noerr*, the defendants in *Pennington* were not engaged in purely political activity.[125] The allegations of dumping coal on the spot market indicated a conspiracy that would, standing alone, violate antitrust laws.[126]

In *Pennington*, all other activity that was not governmental petitioning remained susceptible to antitrust liability on remand. Justice Douglas pointed this out in his concurrence:

> On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.[127]

The *Pennington* Court emphasized the distinction between the defendants' private actions and their actions in the political arena. The Court determined that petitioning activity, which was one part of a broader course of anticompetitive conduct, was protected under the *Noerr* doctrine, but that the remainder of the defendants' conduct was not.[128] Therefore, the Court concluded that evidence of the petitioning activity should not have been put before the jury and that admitting such evidence could not be considered harmless error.[129]

In *Pennington*, the Court announced that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[130] The Court's discussion of the antitrust immunity is instructive in that the focus remains, as in *Noerr*, on political activity, which is outside the scope of the Sherman Act.[131] Despite the recognition of the constitutional under-

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Non-Labor Groups Violate the Antitrust Laws?, 51 CORNELL L.Q. 576 (1966); Comment, *Labor Law—Employers' Right to Close Plant Due to Union Activities*, 2 GA. ST.B.J. 521 (1966); Comment, *Labor and Antitrust Law: Union Combinations with Non-Labor Groups*, 27 MONT. L. REV. 107 (1965); Note, *Labor Law—Application of Antitrust Law to Union Activities—Extra Unit Agreements*, 44 N.C.L. REV. 474 (1966); Comment, *Union Activity Falls Within the Ambit of the Sherman Antitrust Act When a Conspiracy Between Labor and Management is Found*, 11 N.Y.L.F. 549 (1965); Note, *Collective Bargaining Under the Antitrust Laws*, 61 NW. U.L. REV. 156 (1965).

[125] 381 U.S. at 669-70.

[126] *Id.* at 670.

[127] *Id.* at 672-73 (Douglas, J., concurring).

[128] *Id.* at 670.

[129] *Id.*

[130] *Id.*

[131] *Id.*

pinnings to the doctrine in *Noerr*,[132] the emphasis of the Court in *Pennington* remained one of statutory construction.[133]

C. California Motor Transport v. Trucking Unlimited

The third major development of the *Noerr-Pennington* doctrine came in 1972 with the Supreme Court's decision in *California Motor Transport v. Trucking Unlimited*.[134] One group of trucking companies filed an antitrust suit alleging that another group of trucking companies had conspired to bring meritless actions before state regulatory agencies and courts. The complaint alleged that the truckers' purpose was to defeat the plaintiffs' efforts to gain operating rights in California so that the defendants would monopolize the freight-hauling business in the area.[135] The district court dismissed the complaint on the ground that the defendants' activities were protected under the *Noerr-Pennington* doctrine. The Ninth Circuit Court of Appeals reversed on two grounds: First, the *Noerr-Pennington* immunity did not extend to efforts to influence adjudicatory agencies and courts;[136] and second, even if it did, the defendants' activities were within the sham exception articulated in *Noerr*.[137]

The Supreme Court granted certiorari[138] and affirmed on the second ground. Justice Douglas, writing for the majority, rejected the circuit court's contention that the *Noerr-Pennington* doctrine did not extend to attempts at petitioning through courts and administrative tribunals.[139] The Court affirmed the circuit court's view, however, that the defendants' activities in *California Motor Transport* came within the sham exception to the doctrine.[140]

In extending *Noerr-Pennington* protection to activities directed at courts, the Supreme Court observed that the doctrine was based on two grounds and then stressed the first amendment rationale in plainly constitutional language:[141]

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[132]*See supra* text accompanying note 106.

[133]There is no first amendment language in *Pennington* characterizing the *Noerr* immunity. The Court's entire discussion of the doctrine is of the construction of the Sherman Act.

[134]404 U.S. 508.

[135]*Id.* at 509.

[136]432 F.2d 755, 760 (1971).

[137]*Id.* at 763 (citing *Noerr*, 365 U.S. at 144).

[138]402 U.S. 1008 (1971).

[139]404 U.S. at 510.

[140]*Id.* at 516.

[141]The shift in emphasis by the Court from statutory construction to first amendment protection is distinct. One commentator observed that in *California Motor Transport* the Court virtually abandoned *Noerr's* focus on the proper interpretation of the Sherman Act in favor of an emphasis on the essential first amendment protection the *Noerr* rule affords the individual or group trying to influence governmental decision-making. Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1258 n.31.

> The same philosophy [that the right of petition is one of the fundamental freedoms protected by the first amendment] governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.[142]

Thus, in clear language, the Court defined the constitutional rationale skirted in *Noerr*.[143]

The Court concluded that it could not hold "that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors"[144] because such a holding would violate the first amendment right to petition and the right to association.[145] The extension of the doctrine to court petitioning was largely based on first amendment protections instead of a judicial construction of the Sherman Act. The result of *California Motor Transport* was the protection of concerted petitioning in administrative agency hearings and in the courts, provided that the petitioning was not a sham.[146] Despite the extension of the doctrine, the defendants in the case were not afforded its protection because the Court determined that their particular petitioning was within the sham exception.[147]

The finding of a sham was predicated upon the baselessness of the proceedings brought before the tribunals.[148] The plaintiffs alleged that the proceedings were filed automatically, without probable cause, and without regard for the merits of the case.[149] The Court explained the application of the sham exception:

> One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result . . . . Insofar as the administrative or judicial processes are involved,

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[142]404 U.S. at 510.

[143]*Id.* at 510-11.

[144]*Id.*

[145]*Id.* at 510. The Court's inclusion of the right of association reinforces the shift to full focus on the first amendment rationale for *Noerr-Pennington*.

[146]*Id.* at 510-11.

[147]*Id.* at 511-12.

[148]*Id.* at 513.

[149]*Id.* at 512.

> actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."[150]

After *California Motor Transport*, lower courts using the sham exception were directed by this language and often held that a single lawsuit could not constitute a sham.[151]

Over the course of eleven years, the Supreme Court developed a doctrine establishing that attempts to influence the government through legislative, executive, or judicial petitioning are beyond the reach of antitrust laws.[152] Such activity is protected when it stands alone or when it is part of a broader scheme that violates the antitrust laws, provided that the petitioning conduct is not a sham. Whether the same holds true for governmental petitioning that occurs outside the United States remains to be determined by the Court.

V. Petitioning Foreign Governments

A. *Petitioning Cases Prior to* Noerr-Pennington

Long before the *Noerr-Pennington* doctrine ever came into use, businesses operating abroad were persuading foreign governments to take official actions that, in effect, were harmful to rivals. *American Banana Co. v. United Fruit Co.* is one example.[153] Decided in 1909, the case is the oldest United States Supreme Court decision dealing with the application of United States antitrust laws to activities occurring outside the United States.[154] *American Banana* was a private action for treble damages under Section 7 of the Sherman Act.[155] The plaintiff complained that the defendant had monopolized and restrained trade in bananas, thereby injuring the plaintiff and violating the Sherman Act.[156] The plaintiff had purchased a banana plantation in Panama from a grower named

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[150]*Id.* at 513.

[151]*See* Huron Valley Hosp., Inc. v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979), *vacated*, 666 F.2d 1029 (6th Cir. 1981); MCI Communications Corp. v. American Tel. & Tel. Co., 462 F. Supp. 1072 (N.D. Ill.), *aff'd*, 594 F.2d 594 (7th Cir. 1978), *cert. denied* , 440 U.S. 971 (1979); Mountain Grove Cemetery Ass'n v. Norwalk Vault Co., 1977-2 Trade Cas. (CCH) ¶61,709 (D. Conn. 1977); Central Bank v. Clayton Bank, 424 F. Supp. 163 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied* , 433 U.S. 910 (1977).

[152]Only bona fide efforts to influence domestic governments are beyond the reach of the Sherman Act. For an example of illegitimate petitioning efforts, see Sage Int'l, Ltd. v. Cadillac Gage Co., 507 F. Supp. 939 (E.D. Mich. 1981).

[153]213 U.S. 347. *American Banana* preceded *Noerr* by fifty-two years. The case is rife with petitioning efforts on the part of the defendant, who sought the assistance of the civil government, the military, and the courts to oust its competition from the banana export market. *Id.* at 354-55.

[154]Graziano, *supra* note 41, at 101.

[155]*See* 15 U.S.C. § 15 (1982).

[156]213 U.S. at 355.

O'Connell.[157] Prior to the sale, O'Connell had begun constructing a railroad from the plantation to the coast as a means to get his product to the export market.[158] The defendant allegedly approached O'Connell and informed him that he would either have to combine with them or stop the construction of his railroad.[159] It was claimed that the defendants persuaded the Governor of Panama to recommend that Costa Rica be allowed to administer the land over which the railroad was to run.[160] After the defendant and the government of Costa Rica allegedly interfered with O'Connell's banana export business, O'Connell sold the plantation and the railroad to the plaintiff.[161] Shortly afterward, Costa Rican officials and soldiers seized the plantation and stopped work on the railroad.[162] A Costa Rican court declared that the plantation belonged to a third party, who promptly sold the land to the defendant's agents.[163]

The amount of petitioning in the case was substantial. The defendant allegedly sought to influence the Governor of Panama, the Costa Rican government, Costa Rica's military, and the Costa Rican courts.[164] The Supreme Court held that the complaint did not state a cause of action under the Sherman Act because the acts complained of occurred outside of the United States and were legal under the laws of the nations where they occurred.[165]

Justice Holmes, writing for the majority, relied on the act-of-state doctrine[166] for the holding. The Court stated that

> it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.[167]

In effect, the Court held that successful petitioning was protected from antitrust liability because it resulted in official governmental action that the American courts will not judge.[168]

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[157] *Id.* at 354.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at 354-55.
[163] *Id.* at 355.
[164] *Id.* at 354-55.
[165] *Id.* at 357-59.
[166] *Id.* at 358.
[167] *Id.*
[168] *Id.*

American Banana reflected the "territorial view" of extraterritorial jurisdiction under the Sherman Act.[169] Another view had gained prominence by the time the Court considered *United States v. Sisal Sales Co.*[170] By 1927, the emphasis in determining extraterritorial antitrust jurisdiction had shifted away from the physical location where the activity had occurred to the effects within the United States of acts committed elsewhere.[171] In *Sisal*, the government brought an action under Sections 1 and 2 of the Sherman Act, alleging that five American corporations and one Mexican corporation had conspired inside the territory of the United States to monopolize the import of sisal to this country.[172] The complaint charged that the defendants had persuaded the Mexican government to enact legislation that discriminated against their competition.[173] The result was that only the Mexican corporation was able to purchase sisal from its Mexican producers, and Sisal Sales Co. became the sole importer of the commodity into the United States.[174]

The Supreme Court held that although the discriminatory Mexican legislation had contributed to the conspirators' goals, it did not excuse them from liability by the operation of the act-of-state doctrine.[175] The Court distinguished *American Banana* on the grounds that the conspiracy in *Sisal* was formed inside the United States, and that the effect of the *Sisal* conspiracy within the United States was substantial.[176] Thus, the Court held that the Sherman Act provided a remedy.[177] *Sisal* thus stands for the proposition that when some acts in furtherance of a conspiracy in restraint of trade occur in the United States, and there is a direct effect within the United States, American citizens can be held liable for some actions taken abroad and involving actions of foreign governments.[178] As one commentator observed, *Sisal* established some limits on extraterritorial petitioning:

> The *Sisal* case thus retreated from the broad implication of *American Banana* that a company could never be prosecuted under American antitrust laws for petitioning a foreign government to act in a discriminatory fashion. *Sisal* made clear that such petitioning is punishable under the Sherman Act where the conspiracy

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[169] *See supra* note 32 and accompanying text.
[170] 274 U.S. 268 (1927).
[171] *See generally* TOWNSEND, *supra* note 9, at 44-47.
[172] 274 U.S. at 271-74.
[173] *Id.* at 273.
[174] *Id.* at 273-74.
[175] *Id.* at 276.
[176] *Id.*
[177] *Id.*
[178] *Id.*

in question commences in this country and its anticompetitive effects on American trade are substantial.[179]

These cases were decided prior to the development of *Noerr-Pennington*. Since then, federal courts have faced a more direct assertion of antitrust liability predicated upon foreign governmental petitioning.[180]

B. Foreign Petitioning After Noerr-Pennington

Two circuit courts have since entertained the question whether *Noerr-Pennington* makes attempts to influence foreign governments immune from antitrust liability.[181] However, these circuits announced conflicting answers to that question.

1. Occidental Petroleum v. Buttes Gas & Oil Co.—The earlier case, *Occidental Petroleum v. Buttes Gas and Oil Co.*,[182] held that the *Noerr-Pennington* antitrust immunity does not extend to efforts to influence foreign governments.[183] The case was a private action for treble damages in which the plaintiff alleged that the defendants had instigated an international boundary dispute in the Persian Gulf, which resulted in the plaintiff's inability to enjoy the benefits of its oil concession in the Gulf.[184]

Occidental had acquired an offshore oil concession in the Trucial States from the ruler of one state, Umm al Qaywayn, in 1969.[185] The concession gave Occidental exclusive rights to explore for, extract, and sell oil from the territorial waters of Umm al Qaywayn.[186] Later, the defendants acquired a similar concession from the Ruler of Sharjah, an adjacent state, which granted them offshore rights to territorial waters next to the plaintiff's concession.[187] When the explorations began, the parties worked together harmoniously and exchanged information from undersea testing in 1970.[188] Their cooperation ended when Occidental discovered a major

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[179]Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1267 (footnote omitted).

[180]*See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Coastal States Mktg. v. Hunt, 694 F.2d 1358 (5th Cir. 1983); Bulkferts, Inc. v. Salatin, Inc., 1983-1 Trade Cas. (CCH) ¶65,272 (S.D.N.Y. 1983); Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680; United States v. AMAX, Inc., 1977-1 Trade Cas. (CCH) ¶61,467 (N.D. Ill. 1977).

[181]*See Coastal States Mktg.*, 694 F.2d 1358; Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

[182]331 F. Supp. 92, *aff'd per curiam*, 461 F.2d 1261, *cert denied*, 409 U.S. 950. The Ninth Circuit, in a brief per curiam opinion, affirmed "for the reasons stated in the district court's opinion." 461 F.2d at 1261. Thus, all cites will be to the opinion of the lower court.

[183]331 F. Supp. at 107-08.

[184]*Id.* at 95.

[185]*Id.* at 98.

[186]*Id.*

[187]*Id.* at 98-99.

[188]*Id.* at 99.

oil field nine miles seaward from the lower water mark off the island of Abu Musa. The island belonged to the Ruler of Sharjah, whose claim extended three miles into the waters surrounding the island. At first, the extensive oil find by Occidental appeared to be outside the territory of Sharjah.[189]

After the oil was discovered, a boundary dispute erupted which eventually involved Umm al Qaywayn, Sharjah, Iran, and Great Britain. The complaint alleged that the defendants induced and procured the Ruler of Sharjah to claim ownership of the oil-rich portion of the plaintiff's concession.[190] This allegedly was done by submitting to the British Political Agent, who had authority to approve or reject such claims pursuant to a treaty then in force between Britain and the Trucial States, a backdated decree which represented that the Ruler of Sharjah had claimed territorial waters extending twelve miles seaward from the low water mark off Abu Musa, thereby placing the plaintiff's concession within the Sharjahn claim.[191] When the British agent rejected the decree, the defendants induced the government of Iran to claim the territorial waters in which the plaintiff's concession was located.[192] After at least one incident in which the British naval forces prevented the plaintiff from entering its concession, the Ruler of Umm al Qaywayn requested that the plaintiff stop its operations until the border dispute could be resolved.[193]

Occidental alleged that the defendants intended to extract oil and gas from the plaintiff's concession area once the British withdrew from the Persian Gulf in 1971, with the approval of the Ruler of Sharjah.[194] The defendants responded with five grounds supporting their motion to dismiss, including that their conduct was protected as governmental petitioning under the *Noerr-Pennington* doctrine.[195] The district court refused to extend the *Noerr-Pennington* doctrine to foreign governmental petitioning.[196]

In arguing for the foreign extension of the doctrine, the defendants relied heavily on *Continental Ore Co. v. Union Carbide and Carbon Corp.*[197] as an implied extension by the Supreme Court of the *Noerr-Pennington* immunity to foreign petitioning. In *Continental Ore*, the Court held that the antitrust immunity did not apply to the petitioning of an agent of a Canadian governmental agency when that agent was not performing any governmental function and was in fact a commercial enterprise.[198] Electro Met of Canada was a wholly-owned subsidiary of

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[189] *Id.*
[190] *Id.* at 100.
[191] *Id.* at 100-01.
[192] *Id.* at 101.
[193] *Id.*
[194] *Id.*
[195] *Id.* at 101-02.
[196] *Id.* at 107-08.
[197] 370 U.S. 690 (1962).
[198] *Id.* at 707-08.

Union Carbide and had been appointed by the Canadian government as the exclusive wartime purchasing agent for the Canadian Metals Controller.[199] The plaintiff, Continental Ore, alleged that, through Union Carbide's influence, Continental Ore had been eliminated from the Canadian vanadium market by Electro Met of Canada.[200] Continental Ore offered proof of Union Carbide's influencing efforts, but the offer was denied by the district court.[201] The Supreme Court reversed,[202] rejecting Union Carbide's claim that *Noerr* protected its conduct in influencing purchasing decisions made by its subsidiary pursuant to powers delegated by the Canadian Government.[203] *Noerr* was deemed inapplicable on factual grounds because the conduct sought to be protected was "wholly dissimilar to that of the defendants in *Noerr*."[204] The important dissimilarity was that Union Carbide was "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws."[205] Thus, *Noerr* was simply distinguished on its facts.

The defendants in *Occidental Petroleum* argued that if the Supreme Court had not believed that the *Noerr-Pennington* doctrine could be applied to petitioning foreign governments through their agents, there would have been no need to discuss the difference between private and public conduct.[206] The defendants suggested that the Supreme Court in *Continental Ore* assumed that the *Noerr* doctrine would apply to extraterritorial peitioning when influencing governmental actions was intended.[207] The district court in *Occidental Petroleum* rejected the idea that the Supreme Court had impliedly extended *Noerr* protection to efforts to influence foreign sovereigns.[208] In the district court's view, "an at least equally tenable interpretation of *Continental Ore* is that the Court deemed it unnecessary, in view of the facts, to decide the legal question at all."[209] Absent binding precedent, the district court examined the rationales supporting *Noerr-Pennington* to determine the validity of foreign extension.

Because the court viewed the doctrine as primarily grounded in the first amendment, it concluded that "the case's [sic] rationales do not readily fit into a foreign context . . . ."[210] The court's review of the *Noerr* rationales was succinct. The doctrine was seen as "a desire to avoid a construction of the antitrust laws that might trespass upon the First

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[199] *Id.* at 695.
[200] *Id.*
[201] *Id.* at 703.
[202] *Id.* at 704.
[203] *Id.* at 707-08.
[204] *Id.* at 707.
[205] *Id.*
[206] 331 F. Supp. at 107-08.
[207] *Id.*
[208] *Id.*
[209] *Id.* at 107.
[210] *Id.* at 107-08.

Amendment right of petition."[211] The court observed that the "constitutional freedom 'to petition the Government' carries limited if indeed any applicability to the petitioning of foreign governments."[212]

The court recognized that a second basis for the *Noerr-Pennington* doctrine was the Supreme Court's concern that a representative democracy have continued access to the opinions of those it represents.[213] "The persuasion of Middle Eastern states alleged in the present case is a far cry from the political process with which *Noerr* was concerned," the court observed.[214] It concluded that because the interests asserted in *Occidental Petroleum* were dissimilar from those which *Noerr* protected, no wholesale application of the doctrine outside the United States was justified.[215]

In deciding against foreign application of the *Noerr-Pennington* doctrine, the district court emphasized the doctrine's constitutional underpinnings. The Ninth Circuit Court of Appeals affirmed per curiam for the reasons stated in the district court's opinion, which was regarded as "extensive and well researched."[216]

2. Coastal States Marketing v. Hunt.—Ten years later, in *Coastal States Marketing v. Hunt*,[217] an action under Section 1 of the Sherman Act,[218] the Fifth Circuit Court of Appeals affirmed the district court's directed verdict in favor of the defendants by giving foreign application to the *Noerr-Pennington* doctrine.[219] The defendants had been granted an oil concession by the government of Libya in 1957 for exploration and exploitation rights.[220] These defendants, Nelson Bunker Hunt and his brothers, assigned half of their interest to British Petroleum Ltd.; together, they discovered oil in the Sarir oil field in 1961.[221] The oil field was developed and a pipeline was constructed to the Libyan coast. By 1967, the Hunts and British Petroleum were exporting the "Sarir crude."[222]

In 1971, Libya nationalized British Petroleum's interest in the Sarir field, assigning it to the Libyan-owned Arabian Gulf Exploration Company (AGEC).[223] In response, British Petroleum launched a worldwide publicity campaign claiming title to the crude in newspaper notices.[224] Additionally, the company investigated the movement of crude from the Sarir

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[211] *Id.* at 108 (citation omitted).
[212] *Id.* (footnote omitted).
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] 461 F.2d at 1261.
[217] 694 F.2d 1358 (5th Cir. 1983).
[218] *Id.* at 1362 (citing 15 U.S.C. § 1 (1976)).
[219] 694 F.2d at 1366-67.
[220] *Id.* at 1360.
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*

field and it sent notices to those it identified as buyers. Later, the company filed twenty-nine lawsuits around the world, claiming title to the crude oil exported by AGEC.[225]

The plaintiff entered into contracts with AGEC in May 1973 to purchase Sarir crude. It also arranged to refine the crude at a refinery at Montedison, Italy. An agent of British Petroleum contacted the plaintiff and warned against involvement with Sarir crude because of the title dispute.[226]

In June 1973, the Hunts' remaining interest in the Sarir field was also nationalized by the Libyan Government.[227] A short time later, a British Petroleum agent contacted the Hunts and suggested that they combine their efforts to claim the crude, " 'or to take other joint action to protect our respective rights.' "[228] The Hunts joined in twenty-one of the twenty-nine lawsuits and also initiated their own worldwide publicity campaign to inform crude oil purchasers about the title dispute.[229] One of the lawsuits was a conversion action filed in a Texas state court against Coastal States, which counterclaimed for tortious interference with business relations. The Texas courts denied both claims.[230]

The Hunts resorted to the courts in another incident involving the plaintiff, in which Hunt brought an attachment proceeding against the oil tanker Hilda's cargo because he believed it contained Sarir crude.[231] All the while, the publicity campaign continued.[232] Coastal States alleged that the overall effect was to restrain trade in Sarir crude because the publicity had had a negative effect on Coastal States' efforts to market its products refined from the disputed oil.[233] Coastal States also alleged that, on several occasions, the Hunts had contacted Coastal States' customers to inform them directly of the title dispute. The circuit court noted that "[t]here was evidence that these communications with Coastal's customers frustrated potential sales by Coastal."[234] Eventually Coastal States was unable to obtain a credit extension, in part because it was dealing with Sarir crude.[235] By August, 1973, the plaintiff's economic

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[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.* at 1361; *see* Hunt v. Coastal States Producing Co., 570 S.W.2d 503 (Tex. Civ. App. 1978), *aff'd*, 583 S.W.2d 332 (Tex. 1979).

[231] 694 F.2d at 1361; *see* Hunt v. A Cargo of Petroleum Products Laden on Steam Tanker Hilda, 378 F. Supp. 701 (E.D. Pa. 1974), *aff'd mem.*, 515 F.2d 506 (3d Cir.), *cert. denied*, 423 U.S. 869 (1975).

[232] 694 F.2d at 1361.

[233] *Id.*

[234] *Id.*

[235] *Id.* In an interesting aside, the court stated: "Whether this fact raises an inference or is mere coincidence, two of the banks [that refused to extend Coastal's credit] had

health had deteriorated to the point that it was forced to assign its right in Sarir crude to another firm.[236] Contending that it had lost millions of dollars in profits due to the assignment, Coastal States filed the antitrust action in October of 1974.[237]

In the antitrust action, Coastal States claimed that the publicity campaign by the Hunts was a secondary boycott that sought to intimidate, and succeeded in intimidating, Coastal States' potential customers and bankers.[238] The defendants moved for summary judgment, in part on the grounds that all of their conduct had been protected by the *Noerr-Pennington* doctrine.[239] To support that claim, the defendants relied on four pretrial stipulations which described the Hunts' purpose in initiating the lawsuits as "to establish legal title to the expropriated Sarir crude oil."[240] The defendants' motion for summary judgment was denied. At trial, Coastal States introduced evidence that the purpose behind the Hunts' conduct was to render the crude oil unmarketable.[241] Nevertheless, at the close of the plaintiff's evidence, the district court directed a verdict in the defendants' favor on the ground that the *Noerr-Pennington* doctrine applied.[242] Coastal appealed to the Fifth Circuit, which affirmed.[243]

Coastal States' first contention, that the Hunts' "secondary boycott" was outside the protection of the doctrine, was rejected as being "without merit."[244] The court observed that the publicity campaign initiated by Hunt was similar to the publicity campaign initially protected in *Noerr*.[245]

The circuit court's conclusion that the *Noerr-Pennington* doctrine applied extraterritorially followed from its view that *Noerr* was entirely based on a construction of the Sherman Act and not on constitutional grounds.[246] Discussing *Noerr*, the Fifth Circuit observed:

> [*Noerr*] was not a first amendment decision. While the Court's opinion in *California Motor Transport* stressed the first amendment underpinnings of petitioning immunity, we do not view that opinion as overruling *Noerr*'s clear holding that the Sherman Act simply does not extend to joint efforts to influence government officials.[247]

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employees of Standard Oil Company of Ohio (Sohio) on their boards of directors. Sohio is owned in part by [British Petroleum]." *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.* at 1362.

[239] *Id.*

[240] *Id.* The exact language of the stipulations is set forth at *id.* n.13.

[241] *Id.* at 1362.

[242] *Id.* at 1363.

[243] *Id.* at 1372-73.

[244] *Id.* at 1364.

[245] *Id.*

[246] *Id.* at 1364-65.

[247] *Id.* (footnotes omitted).

Thus, the Fifth Circuit, in characterizing the Supreme Court's opinion in *Noerr* as being based on a construction of the Sherman Act rather than on the constitutional right to petition, arrived at a conclusion directly opposite to that of the Ninth Circuit's in *Occidental Petroleum*.[248]

The Fifth Circuit relied in part on *Continental Ore Co. v. Union Carbide & Carbon Corp.*[249] as support for foreign extension of the petitioning immunity. According to the Fifth Circuit, the Supreme Court's result in *Continental Ore* was best explained by the interpretation that the Court assumed the *Noerr-Pennington* doctrine applied to petitioning foreign governments.[250] Again, the Fifth Circuit in doing so adopted a viewpoint that is totally at odds with that of the court in *Occidental Petroleum*.[251] The Fifth Circuit stated that "the fact that the Court [in *Continental Ore*] distinguished *Noerr* on factual grounds instead of simply holding it inapplicable does support our conclusion that petitioning immunity is not limited to the domestic political arena."[252] The strength of that support is certainly dubious and points to the problems inherently present when courts attempt to look behind the language of the Supreme Court's opinions to what was "really meant." In fact, neither circuit can know with any degree of certainty whether its reading of *Continental Ore* is correct. To base a decision whether to extend the petitioning immunity outside the United States on judicial tea leaves is unacceptable.

The Fifth Circuit did not depend solely on *Continental Ore*, however; it also relied on the official position of the Department of Justice's Antitrust Division that the *Noerr-Pennington* doctrine is not limited to domestic petitioning.[253] These guidelines were not available to the *Occidental Petroleum* court; had they been, they might have affected the outcome of that case.[254] For this combination of reasons, the Fifth Circuit declined to follow *Occidental Petroleum*.[255] As the Fifth Circuit explained:

> We reject the notion that petitioning immunity extends only so far as the first amendment right to petition and then ends abruptly. The Sherman Act, as interpreted by *Noerr*, simply does not penalize as an antitrust violation the petitioning of a government

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[248] *Compare id. with Occidental Petroleum*, 331 F. Supp. at 108; *see supra* text accompanying notes 210-15.

[249] 370 U.S. 690 (1962), *cited in* 694 F.2d at 1365.

[250] 694 F.2d at 1365. The view is shared by Graziano, *supra* note 41, at 132.

[251] *Cf. Occidental Petroleum*, 331 F.Supp. at 107-08; *see supra* text accompanying notes 206-09.

[252] 694 F.2d at 1365.

[253] 694 F.2d at 1366 (citing *Antitrust Guide for International Operations*, *supra* note 24, at E-1, E-17, E-18).

[254] The Antitrust Division's guidelines were published six years after the district court decided *Occidental Petroleum*.

[255] 694 F.2d at 1366.

> agency. We see no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad.[256]

It appears that the court would accept the view that the first amendment basis for the doctrine is insufficient to extend *Noerr-Pennington* protection to foreign governmental petitioning.[257] But because the Fifth Circuit adopted a view of the doctrine that was based totally on the construction of the Sherman Act, its perceptions regarding the applicability or inapplicability of the Bill of Rights to interaction with foreign sovereigns was not an insurmountable barrier to its extension of the *Noerr* doctrine to the petitioning of foreign governments. The court posed an interesting question as to why activity that is protected when performed within the United States should become illegal when performed outside the country.[258] It did not consider as a possible response that political petitioning within the country is subject to the checks included in an open, democratic government, while petitioning in totalitarian regimes would not be subject to the same kinds of safeguards.[259]

In fact, the Fifth Circuit rejected any link between the political persuasion of the foreign government involved and the validity of the petitioning immunity:[260] "The political character of the government to which the petition is addressed should not taint the right to enlist its aid."[261] The court seemed to agree that petitioning is political conduct wherever it occurs, and political conduct is beyond the scope of the Sherman Act, wherever the Act may reach.[262]

Coastal States asserted that the Hunts' threats to litigate claims to the Sarir crude were unprotected in any event because they were not directed at any government.[263] That claim was also rejected, as the Fifth Circuit explained:

> Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. . . . If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.[264]

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[256] *Id.*

[257] At least one commentator has argued against that position. *See* Davis, *supra* note 78, at 444-47.

[258] 694 F.2d at 1366.

[259] *See* Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1273.

[260] 694 F.2d at 1366-67.

[261] *Id.* at 1367.

[262] *See id.* at n.29.

[263] *Id.* at 1367.

[264] *Id.*

Finally, the Fifth Circuit rejected Coastal States' claim that the petitioning activity which occurred in the courts was removed from the protection of the *Noerr-Pennington* doctrine by operation of the sham exception.[265] The court held the plaintiff bound to stipulations which provided that the Hunts' purpose in the campaign, the investigations, and the litigation was to settle their title dispute.[266]

VI. Analysis of the Conflict

The differing results of the Fifth and Ninth Circuits may be explained by their differing views of the "true" rationale underlying the *Noerr* opinion. Both courts limited their analysis to the question: Is the *Noerr-Pennington* doctrine a first amendment doctrine, or is it one of statutory construction? Neither court recognized fully that the two rationales are interwoven to support the doctrine; neither analyzed whether other reasons support application in the foreign context. As a result, the Fifth and Ninth Circuits avoided critical considerations in determining whether the *Noerr-Pennington* doctrine should be applied to the petitioning of foreign governments.

The Ninth Circuit subscribed to the view that the *Noerr-Pennington* doctrine is a first amendment doctrine, based entirely on the right to petition the government for redress of grievances.[267] The *Occidental Petroleum* analysis was direct: Since the *Noerr-Pennington* doctrine is based on the first amendment, and since the first amendment protections are presumably without force outside the United States' territory, the *Noerr-Pennington* doctrine has no validity when applied to petitioning outside the United States.[268]

The *Occidental Petroleum* analysis was flawed in one important respect. It failed to recognize that the *Noerr-Pennington* doctrine was based on both statutory construction and the first amendment, and that the two rationales are inextricably combined. The constitutional character of the doctrine was formally recognized by the Supreme Court in *California Motor Transport*.[269] Yet, that opinion must be read in tandem with the earlier opinions that avoided the constitutional question. The validity of foreign extension should have been tested on both grounds. The *Occidental Petroleum* analysis failed to consider the question of whether the Supreme Court's construction of the Sherman Act is applicable to conduct which occurs outside the United States. It should have considered

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[265] *Id.* at 1371.

[266] *Id.*

[267] Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 461 F.2d 1261 (9th Cir. 1972) (*per curiam*). The Ninth Curcuit adopted the reasoning of the district court, as reported at 331 F. Supp. 92 (C.D. Cal. 1971).

[268] 331 F. Supp. at 107-08.

[269] 404 U.S. 508 (1972); *see supra* notes 141-47 and accompanying text.

whether the policy reasons which supported the creation of the domestic doctrine supported foreign extension, and whether there were other policy considerations involved unique to the foreign context.

In comparing the Fifth and Ninth Circuits' characterizations of the *Noerr* rationales, it appears the Fifth Circuit's analysis[270] is more closely aligned to that of the *Noerr* opinion. The Fifth Circuit correctly recognized that, initially, the *Noerr-Pennington* doctrine was announced because the Court determined that the Sherman Act was not intended to regulate political activity.[271] In *Noerr*, the Supreme Court also strongly intimated, however, that if the Sherman Act were applied to regulate political activity, such an application probably would be unconstitutional.[272] The Fifth Circuit's characterization of *Noerr* was accurate, but the doctrine does not rest on *Noerr* alone.

Just as the Ninth Circuit artificially viewed the *Noerr-Pennington* doctrine in a vacuum of constitutional law, the Fifth Circuit viewed the Supreme Court's construction of the Sherman Act in a vacuum. The Fifth Circuit recognized that the development of the doctrine included *California Motor Transport v. Trucking Unlimited*,[273] which extended petitioning immunity to activities directed at courts and administrative hearings.[274] However, the Fifth Circuit seemed to read *California Motor Transport* selectively for the extension, while ignoring the Supreme Court's belated but express recognition of the constitutional rationale underlying the *Noerr-Pennington* doctrine.

The *Coastal States* rationale was based purely on statutory construction.[275] It viewed the *Noerr-Pennington* doctrine as a limitation on the reach of the antitrust laws, and stated that the limitation should apply to any antitrust case involving the petitioning of a government agency, whether domestic or foreign.[276] Through this construction, the Fifth Circuit extended the *Noerr-Pennington* doctrine as far as the Sherman Act can reach. Because the Fifth Circuit viewed the doctrine in other than its constitutional terms, its application was not limited to the territorial boundaries of the United States.[277]

The question of foreign extension cannot be answered simply by deciding whether the doctrine is constitutionally or statutorily based. To employ such an analysis is to ignore the full history of the doctrine, which includes Supreme Court approval of both rationales. At its core, the *Noerr-Pennington* doctrine is both: It reflects a construction of the Sherman

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[270] *See* 694 F.2d at 1364-67.
[271] *Noerr*, 365 U.S. at 137.
[272] *Id.* at 138.
[273] 404 U.S. 508 (1972), *cited in* 694 F.2d at 1363.
[274] 404 U.S. at 510-11.
[275] 694 F.2d at 1364-65.
[276] *Id.* at 1366.
[277] *Id.*

Act that removes political activity from the sphere of regulated conduct, and that removal is based on the belief that to regulate political conduct would violate the first amendment. The Fifth and Ninth Circuits would have done better to ask whether there are any reasons to develop one set of rules to govern petitioning activity within the United States and another to govern extraterritorial petitioning.

One reason supporting different treatment is that the policies underlying the doctrine's domestic application do not readily support foreign extension. The weight of scholarly opinion is that the first amendment guarantees neither the right to petition foreign governments nor free association outside the United States.[278] It is the law of the place which must determine these assertions of rights when made outside the territory of the United States.

Another major policy reason supporting the *Noerr-Pennington* doctrine is the need to maintain the free flow of information between the constituent and his elected representative.[279] Perpetuation of an effective constituent-representative relationship is an important part of democracy in the United States; however, it is not a relevant consideration when petitioning occurs between an American business operating abroad and a foreign ruler. Where there is no constituency relationship, that policy is inapplicable.

In addition, when the *Noerr-Pennington* doctrine is applied domestically, the governmental entities who are petitioned can be presumed to have the economic well-being of the United States in mind. A similar presumption would be ill-advised in the case of foreign petitioning. The economic health of the United States is not likely to be considered by the executive or legislature of a foreign government when it enacts laws with an economic effect outside its territory.

While policies which brought about the domestic doctrine are inapplicable in the foreign setting, the international business environment introduces new considerations which support foreign extension of the *Noerr-Pennington* doctrine. Those reasons are (1) that American businesses operating abroad will face competitive disadvantages unless United States antitrust laws are construed so as not to discourage their use of foreign political systems; (2) that foreign application of the *Noerr-Pennington* doctrine is consistent with the act-of-state doctrine; and, (3) that foreign ex-

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[278] *See, e.g.*, B. HAWK, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 145-46 (1979); Fischel, *Antitrust Liability for Attempts to Influence Government Actions: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80, 120-21 (1977); Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645, 693 (1977); Graziano, *supra* note 41, at 132; McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 240 (1976); Note, *Corporate Lobbyists Abroad*, *supra* note 2, at 1275-77; Note, *Immunities to Extraterritorial Application of U.S. Antitrust Law*, 12 J. INT'L L. & ECON. 487, 500 n.27 (1978).

[279] *Noerr*, 365 U.S. at 137.

tension of the doctrine is consistent with the position of the executive branch which should, under the principle of the separation of powers, set foreign policy.

American businesses are likely to face competitive disadvantages unless the *Noerr-Pennington* doctrine is applied extraterritorially.[280] If the petitioning of foreign sovereigns can lead to antitrust liability in the United States, some American businesses may consider the risks too great and decide against the pursuit of competitive advantage through political means. At the same time, foreign businesses, which are not subject to U.S. antitrust liability, will be able to act to enhance their market position using political means. The result would be to discourage some United States businesses from participating in foreign politics when there exists the potential for future allegations of an anticompetitive effect in the United States. Foreign political activity by U.S. businesses ought not to be discouraged. The conduct covered by the *Noerr-Pennington* doctrine is lawful petitioning, whether it is to secure the passage of legislation, or to bring lawsuits to challenge title to expropriated property. This conduct is undertaken in recognition of the fact that politics is yet another forum in which competition is possible. That fact remains unchanged whether the conduct is undertaken within the United States or abroad. If U.S. antitrust laws are applied to discourage United States businesses from participating in one of several competitive forums, the result to those businesses is unfair.

The second reason supporting foreign extension of the *Noerr-Pennington* doctrine is that to do so would be consistent with the act-of-state doctrine.[281] The act-of-state doctrine already operates to protect some antitrust defendants from liability for *successful* actions to influence the acts of a foreign sovereign. If petitioning is successful and results in an official action by a foreign government, then United States courts are asked to balance relevant considerations to determine whether they ought to hear any resultant antitrust case.[282] The act-of-state doctrine recognizes that United States courts sitting in judgment on the validity of the official acts of foreign sovereigns could embarrass or impede the executive branch in its conduct of foreign affairs. Such judicial inquiries could also offend the foreign sovereign whose acts are being scrutinized. If it appears that embarrassment, impediment, or offense will result, American courts will not judge the acts of a foreign sovereign nor the influencing efforts by American businesses which precipitated the sovereign's actions. In these situations, the act-of-state doctrine[283] provides an effective defense to allegations that petitioning a foreign sovereign has brought about a significant anticompetitive effect within the United States.

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[280]Hawk, *supra* note 65, at 1001.

[281]*Id.*

[282]*See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); *see supra* notes 59-64 and accompanying text.

[283]*See supra* notes 49-68 and accompanying text.

While the act-of-state doctrine can operate to immunize successful petitioning activity from antitrust liability, there is no similar protection for the antitrust defendant whose petitioning is unsuccessful. Nevertheless, the policies underlying the act-of-state doctrine are just as applicable to the case in which petitioning a foreign government has been unsuccessful. If the *Noerr-Pennington* doctrine is not extended to foreign petitioning cases, unsuccessful petitioners remain potentially liable for their participation in foreign politics. The issue is whether there is a compelling reason to punish an antitrust defendant whose petitioning of a foreign government was unsuccessful, even though his conduct and intentions may have been substantially identical to those of a successful petitioner who is immunized by the act-of-state doctrine.

Special "punishment" for the unsuccessful petitioner is unwarranted. In the unsuccessful petitioning case, a safeguard exists to make certain that antitrust liability is not entirely avoided; that is, only the petitioning activity is immunized.[284] If the petitioning is unsuccessful, then, in the typical case, there will have been other conduct involved that caused the anticompetitive effect complained of.[285] The remainder of that conduct, the broader scheme of anticompetitive activity, is not protected by the *Noerr-Pennington* doctrine.[286] In this way, foreign extension of the doctrine would not operate as a complete bar to antitrust liability in cases involving unsuccessful petitioning activity.

Additionally, to punish an antitrust defendant for being unsuccessful places him in an undesirable position of business uncertainty. At the time the defendant petitions the foreign sovereign, he will be unable to determine whether his actions would have antitrust enforcement consequences. This total absence of notice is unduly harsh and is likely to have one of two consequences: either prospective defendants will be deterred from political competition entirely; or, they will be encouraged to succeed at all costs. Neither consequence is desirable.

Denial of antitrust immunization is also unwarranted for the defendant who elected to direct his petitioning at a foreign government. Since the same activity would clearly be immunized from antitrust activity when performed domestically, the issue is whether the defendant who petitions

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[284] *Pennington*, 381 U.S. at 670. Thus, the "punishment" here referred to is the admissiblity of evidence of the defendant's unsuccessful petitioning activity to develop an antitrust case against him. Evidence of petitioning the government is inadmissible when such activity occurs domestically, under the *Noerr-Pennington* doctrine, and when it occurs both extraterritorily and successfully, under the act-of-state doctrine.

[285] A possible exception to the "typical case" is when the defendant's petitioning activity consists primarily of application to adjudicatory bodies. In that situation, it would seem possible that the cost to the antitrust plaintiff of contesting worldwide lawsuits, as in *Coastal States*, might be sufficiently high to cause a diminution in the plaintiff's ability to compete. Thus, an anticompetitive effect could be achieved through unsuccessful petitioning activity alone.

[286] *Pennington*, 381 U.S. at 670.

extraterritorially should be punished for acting outside the United States. An affirmative response fails to recognize that much modern business is conducted in an international marketplace. American businesses must act extraterritorially in order to compete. They should not be forced to avoid competition for favorable political treatment, especially when that same conduct is recognized as appropriate when it occurs at home.

Finally, foreign extension of the *Noerr-Pennington* doctrine is appropriate because it is consistent with the view adopted by the executive branch. Judicial inquiry into the politics of a foreign nation is involved whenever the courts examine foreign petitioning. This kind of inquiry places the courts in the position of questioning the internal political affairs of a foreign sovereign, and it is likely to offend the other nation's sovereignty. As such, it comes within the area of foreign relations which is primarily within the control of the executive. The separation of powers doctrine counsels that once the executive has stated a policy in the foreign policy area, any subsequent considerations by the courts should reflect that policy.

Regarding foreign governmental solicitation, the Department of Justice, Antitrust Division, adopted guidelines in 1977 that describe the policy of the executive branch.[287] This policy was developed during two years of study by both the Department of Justice and the President's Export Council:[288]

> The only question . . . is whether the *Noerr-Pennington* doctrine applies to efforts to cause a foreign government to impose restraints on U.S. commerce. While the *Noerr* case turns in part on U.S. domestic constitutional considerations, the Department does not consider it to be limited to the domestic area.[289]

Because the Department of Justice and the President's Export Council have determined that the U.S. ought not impose antitrust liability for foreign petitioning activity, U.S. courts should defer to that statement of policy.

It would be helpful if these guidelines, as they relate to the petitioning immunity, were updated and clarified. After seven years,[290] it remains unclear whether the *Noerr-Pennington* doctrine is fully operative outside the United States. For example, it is presently unknown whether the sham exception applies in the same manner extraterritorially as it applies domestically. Because foreign governmental systems are widely varied, iden-

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[287]*See generally Antitrust Guide for International Operations*, *supra* note 24, at E-1 to E-18.

[288]*See Antitrust Guide for International Operations, supra* note 24, *reprinted in* SEVENTEENTH ANNUAL ADVANCED ANTITRUST LAW SEMINAR: INTERNATIONAL TRADE AND THE ANTITRUST LAWS, 199 (1977).

[289]*See Antitrust Guide for International Operations*, *supra* note 24, at E-18 (footnote omitted).

[290]The Antitrust Division's guidelines were promulgated in 1977. *See id.* at E-1.

tifying sham activity extraterritorially will be more difficult and cannot be dealt with in a generalized manner. Revised guidelines should address application of the sham exception in systems other than representative democracies, where domestic application is analogous.

The uncertainty remains whether extraterritorial application of the *Noerr-Pennington* doctrine is coextensive to domestic application of the doctrine. Because of the flexibly applied act-of-state doctrine, there may be no need to invoke the *Noerr-Pennington* doctrine in successful extraterritorial petitioning cases. Whether selective application of the *Noerr-Pennington* doctrine to unsuccessful extraterritorial petitioning is desired should be addressed in updated guidelines.

Private antitrust litigators would be greatly assisted by a better definition of the executive branch's view of the foreign reach of *Noerr-Pennington*. Additionally, the courts would benefit from greater direction in an area better left to executive leadership. If the view that the doctrine should be extended is to be followed, precise guidelines are needed so that the courts can be consistent in their decisions with the executive implementation of foreign policy. As more circuit courts face the question of foreign application of the *Noerr-Pennington* doctrine, it may become necessary for the Supreme Court to resolve this conflict that has emerged between the Fifth and Ninth Circuits. The Supreme Court should consider those policies unique to foreign petitioning discussed here, and extend the *Noerr-Pennington* doctrine to attempts to influence foreign governments.

VII. Conclusion

Businesses operating internationally are subject to the antitrust laws of the United States through the exercise of "extraterritorial jurisdiction." When they become involved in antitrust litigation for conduct which occurred outside the United States, it is not uncommon for defendants to argue that their conduct was somehow legal or compelled by the government of another nation. To avoid problems in foreign relations and to advance international comity, the courts have adopted doctrines, such as act-of-state and sovereign compulsion, so that American courts will not be placed in a position of judging the laws of another nation.

A different situation arises when the government or a private plaintiff alleges that the defendant has violated antitrust laws by inducing or attempting to induce a foreign nation to take action which would be detrimental to the defendant's competitor. That kind of activity is protected under the *Noerr-Pennington* doctrine when performed within the United States because of its political character. Courts are split, however, as to whether the petitioning activity should also be protected when an antitrust defendant has petitioned a foreign government. The Fifth and Ninth Circuits, the only courts that have considered the question, have expressed opposing views on the subject. The view expressed by the Fifth

Circuit in *Coastal States Marketing v. Hunt*, that the *Noerr-Pennington* doctrine does apply extraterritorially, is the better view, especially in light of the policy considerations unique to foreign petitioning and the official position adopted by the Department of Justice in 1977. But because of the uncertainty in the area as a result of the conflict in the circuits, it would be advisable for the Antitrust Division of the Justice Department to update those guidelines to explain precisely when and how the *Noerr-Pennington* doctrine should be applied extraterritorially.

PAMELA R. KELLEY

Karcher v. Daggett: The Supreme Court Draws the Line on Malapportionment and Gerrymandering in Congressional Redistricting

I. Introduction

The framers of the United States Constitution were very explicit as to how the seats in the House of Representatives were to be apportioned among the several states.[1] The framers omitted, however, the standards that the states should uphold when drawing the congressional districts once the House seats had been apportioned. That task fell upon the United States Supreme Court, which has read into article I, section 2 of the Constitution certain guidelines with respect to redistricting.

This Note will review the apportionment process and the Supreme Court's involvement in redistricting.[2] The recent case of *Karcher v. Daggett*,[3] in which the Court held that New Jersey's congressional district plan was unconstitutional because its .6943% interdistrict population variance[4] was unjustified, will then be discussed and analyzed at length. Finally, the *Karcher* decision will be used as a standard to assess the constitutionality of the Indiana congressional district plan enacted after the 1980 census.

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[1]U.S. Const. art I, § 2, cl. 3:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . . .

[2]Every ten years, state legislatures redistrict both federal and state legislative districts. Thus, the legislators draw the districts of the United States House of Representatives as well as the districts of the state's House and Senate. This Note will focus on the constitutional requirements state legislatures must observe in drawing federal congressional districts. The drawing of federal congressional districts must comport with the United States Constitution, but the drawing of state legislative districts has been treated differently by the Supreme Court. *See infra* note 71.

[3]103 S. Ct. 2653 (1983).

[4]A state's total interdistrict population variance is the percentage difference between the smallest district's population and the average district population plus the percentage difference between the largest district's population and the average district population. Imagine a state with two congressional districts with populations of 10 and 14. Because the state's total population is 24, and it has two districts, the average size district for this state is 12. The smallest district's population, 10, is 16.7% lower than 12. The largest district's population, 14, is 16.7% higher than 12. Thus, this state's total interdistrict population variance is 16.7% + 16.7% = 33.4%.

Notice that this method could exaggerate the variance in a congressional district plan

II. Reapportionment and Redistricting

A. Reapportionment

Reapportionment refers to the process of assigning each state the number of congressional representatives to which it is entitled.[5] With the bicameral legislature compromise of 1787[6] came the troubling question of how many House seats there should be and how those seats should be distributed among the various states. At the Constitutional Convention, the framers formed a committee which settled on a House seat distribution plan and incorporated it into the Constitution.[7] However, article I, section 2 did not specify any guidelines for future apportionments. Therefore, Congress passed the first apportionment bill after the 1790 census.[8] Washington felt that this bill was unconstitutional because the apportionment scheme was not based on the population of the states, and because it allotted eight states more than one representative for every 30,000 persons, contrary to article I, section 2, clause 3; therefore, Washington exercised the first presidential veto on this bill.[9] The reapportionment bill which was finally approved based the distribution of House seats on the population of the states, allotting one house seat for every 33,000 persons.[10]

Various refinements in the reapportionment process occurred in the nineteenth century, particularly with respect to the structure of the districts themselves. The 1842 Reapportionment Act required that House members be elected from districts composed of contiguous territory equal in number to the number of representatives to which that state was entitled, with

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since only extremes, the least and most populous districts, are used. For example, if a state had seven districts, five of which had identical populations, the total interdistrict population variance would only take into account the two districts above and below the average sized district. However, a state must justify any variance, no matter how small. Kirkpatrick v. Preisler, 394 U.S. 526 (1969). Therefore, this exaggeration would not necessarily place a higher burden of justification on the state. The courts have also referred to the interdistrict population variance as the maximum population deviance.

[5]U.S. Const. art. I, § 2, cl. 3. *See supra* note 1.

[6]This compromise was between large and small states, resulting in the creation of two legislative houses. The upper house would be composed of two delegates from every state, regardless of its size; and the lower house would be composed of delegates assigned in number to the states on the basis of population. B. Mitchell, A Biography of the Constitution of the United States 70 (1964).

[7]*Id.* at 69-72. *See* U.S. Const. art. I, § 2, cl. 3. The precise apportionment of representatives in the Constitution was premised on little more than an estimate of each state's population, since reliable population figures were unavailable. L. Schmeckebier, Congressional Apportionment 107 (1941) [hereinafter cited as L. Schmeckebier].

[8]L. Schmeckebier, *supra* note 7, at 107.

[9]*Id.* at 108.

[10]*Id.* Act of April 14, 1792, 1 Stat. 253. Reapportionment of House seats was done after each decennial census, the custom being to give from one to three seats to any state entering the Union between censuses. L. Schmeckebier, *supra* note 7, at 117-22.

only one representative per district allowed.[11] The Reapportionment Act of 1872 added the requirement that districts contain, as nearly as practicable, an equal number of inhabitants.[12] Finally, the Act of 1901 added the requirement of compactness.[13]

These requirements threatened the hold which rural state legislators had on the redistricting process.[14] Rural areas were often over-represented in state legislatures,[15] and because population and compactness requirements were previously not included in congressional reapportionment statutes, rural areas were often over-represented at the congressional level as well. The requirements codified by Congress made it likely that urban areas would receive greater representation. In an attempt to stop such a shift of power, rural congressional legislators blocked passage of a new reapportionment bill following the 1920 census.[16] A reapportionment bill was finally passed in 1929,[17] but the requirements of contiguity, population equality, and compactness were not included in the legislation.[18] This exclusion led to the first major Supreme Court case dealing with the structural requirements of congressional districts, *Wood v. Broom*.[19]

Broom, a resident of New Jersey, asserted that it was the right of every voter to reside in fairly drawn congressional districts. Consequently, he challenged a Mississippi statute which redrew congressional district lines after Mississippi's congressional delegation was decreased from eight to seven following the 1930 census.[20] The dispute arose because the statute

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[11]Act of June 25, 1842, ch. 47, 5 Stat. 491. *See* L. SCHMECKEBIER, *supra* note 7, at 113.

[12]Act of Feb. 2, 1872, ch. 11, 17 Stat. 28. *See* L. SCHMECKEBIER, *supra* note 7, at 118.

[13]Act of Jan. 16, 1901, ch. 93, 31 Stat. 733. Compact districts are those which contain the requisite population in as circular an area of the state as possible. Compactness can be measured in several ways. One method is the ratio of the perimeter of the district to the circumference of a circle with the same area as that district; another method is the ratio of the area of the smallest circle that could be drawn around the district. B. MORRILL, POLITICAL REDISTRICTING AND GEOGRAPHIC THEORY 22 (1981). *See also* Karcher v. Daggett, 103 S. Ct. 2653, 2673 n.19 (Stevens, J., concurring).

[14]CONGRESSIONAL QUARTERLY, CONGRESSIONAL DISTRICTS IN THE 1970's 221 (2d ed. 1974) [hereinafter cited as CONGRESSIONAL DISTRICTS IN THE 1970's].

[15]This was due to *state* legislative districts being based primarily on geographical boundaries rather than population.

[16]CONGRESSIONAL DISTRICTS IN THE 1970's, *supra* note 14, at 221.

[17]Act of June 18, 1929, ch. 28, 46 Stat. 26 (codified as amended at 2 U.S.C. § 2a (1982)). While the size of the House of Representatives remains a constant 435 members, the populations of the states with respect to one another change. Thus, the distribution of the 435 congressional seats changes. Pursuant to 2 U.S.C.§ 2a(a), each state receives one seat automatically, and the remaining 385 seats are apportioned using the method of equal proportions. For a description of this complex formula, its effect on the reapportionment process, and an assessment of alternative methods of reapportionment, see L. SCHMECKEBIER, *supra* note 7, at 125.

[18]L. SCHMECKEBIER, *supra* note 7, at 1-107.

[19]287 U.S. 1 (1932).

[20]*Id. See also* B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 357 (1965).

created congressional districts which were not compact and contained disparities in population. The Supreme Court held that since the 1929 Reapportionment Act did not incorporate the requirements of population equality, compactness, and contiguity included in earlier reapportionment bills, those requirements had expired.[21] Federal legislation presently in effect calls for the Secretary of Commerce to evaluate redistricting plans to assure the implementation of unspecified neutral objectives.[22]

B. Redistricting

After the reapportionment process ends, the redistricting process begins.[23] Redistricting is the process a state legislature undertakes to divide the state into the number of districts Congress has apportioned to it. Redistricting has often been characterized by two practices which give the political party in power in a state legislature a higher probability of winning congressional seats. These practices are gerrymandering and malapportionment.[24]

1. Gerrymandering.—Gerrymandering refers to the excessive manipulation of geographic boundaries of legislative districts to benefit a certain incumbent party.[25] This perversion of the redistricting process may take one of three forms: the majority party draws district lines to perpetuate the status quo and its position of power; bipartisan gerrymandering occurs when both parties act to protect the seats of their incumbent congressmen; or, the majority party's power over redistricting is traded for support of legislative proposals or wielded to punish political opponents.[26]

Gerrymandering has at least four adverse effects on voters and the goal of fair and effective representation for all citizens. First, because many districts are virtually guaranteed to one party, the value of the voter's political participation is diluted.[27] Second, incumbents in these districts may be less responsive to the interests of all constituents since the probability of defeat in an election is small.[28] Third, gerrymandering allows political parties to field weak candidates in districts where they will have little chance of losing thereby weakening the parties.[29] Finally, the political

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[21]287 U.S. at 8.

[22]Act of Aug. 31, 1954, ch. 1158, 68 Stat. 1019 (codified as amended at 13 U.S.C. § 141 (1982)). This evaluation is ultimately carried out by the judicial branch when redistricting plans are the subject of litigation.

[23]*See supra* note 5.

[24]CONGRESSIONAL DISTRICTS IN THE 1970's, *supra* note 14, at 228.

[25]The term was coined in 1812 when the Massachusetts legislature drew a bizarrely shaped district which critics thought looked like a salamander. One critic dubbed the district the "gerrymander" after Elbridge Gerry, then Governor of Massachusetts. *Id.* at 225.

[26]Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation,"* 14 HARV. J. ON LEGIS. 825, 839-41 (1977).

[27]*Id.* at 843.

[28]*Id.*

[29]*Id.* at 844.

strength of racial, ethnic, and other minorities may be diluted by lumping them into as few districts as possible or by putting pockets of minorities into many districts.[30]

In spite of these ill effects, gerrymandered plans seem to go unchallenged most of the time. This is probably due to recognition by the courts that the redistricting process is a political animal, and partisan motives are often behind the choices legislatures make in drawing district lines.[31] Eventually, however, the Supreme Court focused on one characteristic[32] of gerrymandering, malapportionment, to provide some guidance to state legislatures in the redistricting process.

2. Malapportionment.—Malapportionment refers to gross disparities in the populations of a state's congressional districts,[33] and is commonly measured by a state's total interdistrict population.[34] Originally, many states did not base district lines on population,[35] and population disparities have frequently arisen from the failure of state legislatures to redistrict over long periods of time.[36] The adverse effects of malapportionment are quite similar to the adverse effects of gerrymandering,[37] but malapportionment is particularly damaging to the goal of fair and effective representation for all. Depending on whether a congressional district's population is larger or smaller than the state's average-sized district, the voting power of individuals in that district will be decreased or increased proportionally. Unlike gerrymandering, the opportunity to use malapportionment for political purposes has decreased in recent years because United States Supreme Court decisions have placed severe restrictions on interdistrict population variances.[38]

The Supreme Court's involvement in assessing the constitutionality of malapportionment has undergone a major evolution. At first, the Court was reluctant to become involved in the redistricting process, which it viewed as purely political.[39] Later, however, the court became more active in this area, and began to elucidate a standard for congressional redistricting.[40]

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[30]*Id.*

[31]*See infra* note 131 and accompanying text.

[32]Gerrymandering has many components. The United States Supreme Court has identified several. *See infra* note 131.

[33]CONGRESSIONAL DISTRICTS IN THE 1970's, *supra* note 14, at 228.

[34]*See supra* note 4.

[35]CONGRESSIONAL DISTRICTS IN THE 1970's, *supra* note 14, at 228.

[36]*Id.*

[37]*See supra* text accompanying notes 27-30.

[38]*See, e.g.*, Karcher v. Daggett, 103 S. Ct. 2653 (1983) (New Jersey's plan with a .7% variance struck down); White v. Weiser, 412 U.S. 783 (1973) (Texas' plan with a 4.13% variance struck down); Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (Missouri's 5.97% variance struck down).

[39]*See* Colegrove v. Green, 328 U.S. 549 (1946).

[40]*See, e.g.*, Wesberry v. Sanders, 376 U.S. 1 (1964); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

a. Justiciability:[41] *The Court hesitates.*— The existence of gross malapportionment in Illinois prompted a Northwestern University political science professor to take court action. In *Colegrove v. Green*,[42] Colegrove argued that the officers of Illinois should be restrained from conducting the congressional election because interdistrict population variances violated the equal protection clause of the fourteenth amendment.[43] At the time, congressional districts in Illinois varied in population from 112,116 to 914,053, a total interdistrict population variance of over 264%.[44]

In dismissing the action as not justiciable, Justice Frankfurter, writing for the majority, stated the traditional rationale why the Court would not act: "Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof."[45]

Justice Black replied with a vigorous dissent.[46] Citing prior case law in support of justiciability,[47] Justice Black stated that "[n]o one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote."[48]

Colegrove was not well-received by many legal scholars impatient with the Court's position, who wanted some judicial action to correct the extreme population disparities which existed in the congressional districts of the states.[49] Over time, the complexion of the Supreme Court changed to include new members more inclined toward judicial action on the redistricting problem.[50] By 1962 only three members of the *Colegrove* Court remained,[51] when the landmark justiciability case of *Baker v. Carr*[52] was decided.

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[41]A justiciable controversy is one which is appropriate for judical determination. BLACK'S LAW DICTIONARY 777 (5th ed. 1979). The four categories of *non*justiciability are lack of ripeness, mootness, lack of party standing, and political questions. The *Colegrove* case presented a political question. For a discussion of the subcategories of political questions, see Baker v. Carr, 369 U.S. 186, 217 (1962).

[42]328 U.S. 549 (1946).

[43]*Id.* The plaintiffs did not base their action on art. I, § 2 of the U.S. Constitution. Since the court decided that the issue was nonjusticiable, the theory of liability was probably irrelevant.

[44]*Id.*

[45]*Id.* at 553. Actually, because Justice Rutledge's concurring opinion asserted that the controversy was justiciable but should be dismissed for want of equity, a majority of the Court (Rutledge and the four dissenters) disagreed with the plurality opinion as to justiciability.

[46]*Id.* at 566.

[47]Smiley v. Holm, 285 U.S. 355 (1932) (holding that the Constitution does not exempt redistricting statutes from a governor's veto).

[48]328 U.S. at 569 (Black, J., dissenting).

[49]CONGRESSIONAL DISTRICTS IN THE 1970's, *supra* note 14, at 233.

[50]*Id.*

[51]Only Justices Black, Douglas, and Frankfurter were on the Court in both *Colegrove* and *Baker v. Carr*.

[52]369 U.S. 186 (1962).

In *Baker*, a group of Tennessee citizens sued to enjoin elections, claiming that the *state* legislative districts violated the Constitution. Tennessee had not redrawn its districts in over fifty years, and by 1960 the Tennessee House districts had populations varying from 3,454 to 36,031, and Senate districts varying from 39,727 to 108,094.[53] The plaintiffs claimed that their votes were debased because they were from overpopulated districts and that this denied them equal protection under the law.[54] The district court, relying on *Colegrove*, dismissed the complaint for lack of subject matter jurisdiction,[55] but the United States Supreme Court reversed the judgment and remanded the case, holding that *Colegrove* was dismissed for want of equity, and not because the cause of action was nonjusticiable.[56] With the barrier of justiciability set aside, *Baker* made it clear that the Court would no longer shy away from involvement in the political process of redistricting.

b. The "As Nearly As Practicable" Standard: The Court steps in.— Although *Baker* was a case dealing with state legislative districts, not congressional districts, it paved the way for the Court to find that controversies concerning congressional districts were justiciable. Because many states' congressional districts still had gross interdistrict population variances,[57] it is not suprising that a landmark congressional redistricting case was decided by the United States Supreme Court only two years after *Baker*. The case was *Wesberry v. Sanders*,[58] and the state was Georgia. Georgia's congressional districts ranged in population from 272,154 to 823,860.[59] Voters in that state's most populous district claimed that Georgia's congressional districts violated 42 U.S.C. sections 1983 and 1988, since their votes were worth less than the votes of other Georgians.[60]

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[53] *Id.*

[54] *Id.* at 204.

[55] 179 F. Supp. 824 (M.D. Tenn. 1959).

[56] 369 U.S. at 234. On remand, the Tennessee districts were invalidated. 206 F. Supp. 341 (1962). The district court held that the equal protection clause requires that at least one house of a state legislature have districts based on population.

[57] The interdistrict population variances during the 88th Congress in states with more than one congressional district, in increasing order, were: Maine, 9%; North Dakota, 11%; Rhode Island, 14%; New Hampshire, 19%; Iowa, 23%; Massachusetts, 24%; Minnesota, 25%; Nebraska, 27%; New York, 30%; Missouri, 30%; West Virginia, 32%; Montana, 37%; Kansas, 38%; Washington, 41%; Idaho, 46%; North Carolina, 52%; Arkansas, 54%; Virginia, 57%; Utah, 57%; Oregon, 58%; Pennsylvania, 60%; Kentucky, 60%; Illinois, 65%; South Carolina, 65%; Louisiana, 67%; California, 69%; Mississippi, 72%; Connecticut, 73%; Wisconsin, 74%; Oklahoma, 77%; New Jersey, 82%; South Dakota, 93%; Indiana, 96%; Tennessee, 102%; Florida, 103%; Colorado, 105%; Maryland, 106%; Arizona, 107%; Ohio, 116%; Georgia, 140%; Michigan, 144%; Texas, 169%; Alabama, Hawaii and New Mexico elected all of their congressmen at-large. The variances were computed from population figures in CONGRESSIONAL DISTRICT DATA BOOK (DISTRICTS OF THE 88TH CONGRESS) (1964).

[59] *Id.*

[60] *Id.* Because voters in the smallest district could elect a representative with one third of the votes needed in the largest district, the votes of individuals in the smallest district

Writing on behalf of the *Wesberry* majority, Justice Black interpreted article I, section 2 of the Constitution to require, "as nearly as . . . practicable,"[61] that one man's vote in a congressional election be worth as much as another's.[62] The Court did not provide precise guidelines as to how much interdistrict population variation the Constitution would allow, saying only that

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.[63]

The Supreme Court attempted to elucidate this "as nearly as practicable" standard in *Kirkpatrick v. Preisler*.[64] The total variance involved in *Kirkpatrick*, 5.97%, was much smaller than the disparities involved in earlier cases; nevertheless, the Missouri congressional district scheme was struck down by the Supreme Court on article I, section 2 grounds.[65] Justice Brennan, writing for the majority, said that the "as nearly as practicable" standard "requires that the State make a good-faith effort to achieve precise mathematical equality. . . . Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."[66]

Brennan's mathematical standard elicited a number of responses from various members of the Court. For Justice Fortas, Brennan's method of determining the constitutionality of Missouri's congressional districts was too strict. Justice Fortas concurred in the judgment, but not in the standard of near perfection: "[T]he majority's pursuit of precision is a search for a will-o'-the-wisp."[67] The dissenters[68] believed that a variance of five percent was permissible. Justice White said that a variance of ten to fifteen percent was the upper limit of constitutionality,[69] but Justices Harlan and Stewart disagreed with the use of a mathematical standard at all:

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were three times as powerful. Also, persons in the smallest district had three times as much congressional representation.

[61] *Id.* at 7-8. This language is much older than the *Wesberry* case. Congress included this requirement in the Reapportionment Act of 1872, but it did not have the judicial backing of the Supreme Court until *Wesberry*. *See supra* text accompanying note 12.

[62] 376 U.S. at 7-8.

[63] *Id.* at 18.

[64] 394 U.S. 526 (1969).

[65] *Id.*

[66] *Id.* at 530-31 (citation omitted).

[67] *Id.* at 538 (Fortas, J., concurring).

[68] Harlan, Stewart, and White dissented to *Kirkpatrick* in a companion case decided the same day, Wells v. Rockefeller, 394 U.S. 542, 549 (1969).

[69] *Id.* at 553 (White, J., dissenting).

"[T]he Court's exclusive concentration upon arithmetic blinds it to the realities of the political process . . . ."[70]

The restriction of allowable interdistrict population variance under *Wesberry* and *Kirkpatrick* prompted swift state action in the 1970's to conform with these decisions.[71] In fact, every state with more than one congressional district dramatically reduced its interdistrict population variance after the 1970 census.[72] After the 1980 census, when seventeen congressional seats were reapportioned from the northeast and midwest to the south and southwest,[73] states made even greater efforts to achieve interdistrict population equality.[74] In fact, Michigan achieved almost perfect interdistrict population equality: sixteen of that state's eighteen congres-

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[70]*Id.* at 551 (Harlan, J., dissenting).

[71]The United States Supreme Court has been more lenient as to population requirements in state legislative districts. In Chapman v. Meier, 420 U.S. 1 (1975), the Court held that minor population deviations in such districts did not establish a prima facie constitutional violation, "[a]s contrasted with congressional districting, where population equality appears now to be the preeminent, if not the sole, criterion on which to adjudge constitutionality . . . ." *Id.* at 23 (citations omitted). *See also* Brown v. Thomson, 103 S. Ct. 2690 (1983), where the Court upheld Wyoming's state legislative district plan even though it embodied an 89% interdistrict population variance. The Court found that sacrificing population equality to allow one representative for the Wyoming county in question was a legitimate state interest.

[72]The interdistrict population variances of the 93rd Congress, in increasing order, were: South Dakota, .01%; Utah, .02%; Connecticut, .04%; Wisconsin, .07%; Montana, .14%; Nebraska, .15%; Idaho, .20%; Arizona, .22%; Oregon, .22%; Indiana, .23%; Rhode Island, .24%; Arkansas, .27%; Florida, .28%; Louisiana, .33%; Kentucky, .40%; Oklahoma, .43%; Maine, .46%; Ohio, .50%; Michigan, .54%; Missouri, .63%; Colorado, .64%; Iowa, . 65%; Virginia, .68%; Alabama, .78%; West Virginia, .79%; New Hampshire, .96%; New Jersey, .98%; Georgia, 1.1%; New Mexico, 1.2%; Illinois, 1.3%; Minnesota, 1.4%, Kansas, 1.6%; Massachusetts, 1.6%; Pennsylvania, 2.2%; Maryland, 2.6%; New York, 2.7%; California, 2.8%; North Carolina, 3.8%; Mississippi, 4.1%; Texas, 4.9%; South Carolina, 8.2%; Tennessee, 8.3%; Washington, 8.5%; and Hawaii, 11.9%. These variances were computed from population figures in CONGRESSIONAL DISTRICT DATA BOOK (DISTRICTS OF THE 93RD CONGRESS) (1973).

[73]Florida gained four seats; Texas three, California two, and Tennessee, Washington, Colorado, Arizona, Oregon, New Mexico, Utah, and Nevada each gained one. New York lost five seats; Pennsylvania, Illinois, and Ohio each lost two; and Michigan, New Jersey, Massachusetts, Indiana, South Dakota, and Missouri each lost one. CONGRESSIONAL DIRECTORY, 98TH CONGRESS 438 (1983).

[74]The interdistrict population variances of the 98th Congress, in increasing order, are: Michigan, .0002%; Colorado, .0025%; Minnesota, .009%; Hawaii, .01%; Illinois, .03%; Idaho, .04%; Arizona, .08%; Iowa, .10%; Florida, .13%; Wisconsin, .14%; Oregon, .17%; Missouri, .18%; Mississippi, .21%; Nebraska, .23%; Pennsylvania, .24%; New Hampshire, .24%; Texas .28%; South Carolina, .29%; Kansas, .34%; Maryland, .35%; California, .38%; Louisiana, .42%; Utah, .43%; Connecticut, .48%; Oklahoma, .57%; Ohio, .61%; Nevada, .68%; New Jersey, .70%; Arkansas, .77%; New Mexico, .87%; Massachusetts, 1.1%; Washington, 1.4%; Kentucky, 1.4%; New York, 1.6%; North Carolina, 1.8%; Virginia, 1.8%; Georgia, 2.0%; Indiana, 2.4%; Tennessee, 2.4%; Maine, 6.6%; Rhode Island, 7.8%; Montana, 8.5%; West Virginia, 12.8%; and Alabama, 48%. These variances were computed from district population figures in CONGRESSIONAL DIRECTORY, 98TH CONGRESS (1983).

sional districts have exactly the same population, while the remaining two each have but one person fewer.[75]

Although the United States Supreme Court's redistricting decisions caused state legislatures to consider interdistrict population variance when drawing new district maps, the exact constitutional parameters were not yet settled. The Supreme Court had indicated that absent a good-faith effort to achieve interdistrict population equality, even minute variances had to be justified.[76] Yet, the Court also recognized that exact interdistrict population equality would be difficult, if not impossible, to achieve.[77] Thus, while it was clear an interdistrict variance of 5.97% was too large in *Kirkpatrick*, what percentage the Court would deem acceptable was unknown. Ironically, Indiana's variance of about 2.4% is the greatest (along with Tennessee) of the states which lost or gained seats after the 1980 census, yet Indiana's districts have not been attacked as unconstitutional; while New Jersey, with a comparatively minute variance of less than .7%, was the subject of the Supreme Court's most recent attempt to express the specific requirements of the "as nearly as practicable" standard.[78]

III. *Karcher v. Daggett* AND THE NEW JERSEY PLAN

Judicial involvement in the drawing of legislative districts in New Jersey occurred in twelve of the sixteen years immediately prior to the 1980 census;[79] thus, it was not surprising that the congressional district plan adopted by the New Jersey legislature after the 1980 census also became the subject of litigation. The census revealed that New Jersey had grown at a slower rate than many other states;[80] so after the 1980 apportionment, it lost one of its congressional seats. Consequently, an entirely new congressional district map had to be drawn with fourteen, rather than fifteen, districts. The map adopted by the Democratic-controlled New Jersey legislature was the Feldman Plan,[81] signed into law by the Democratic governor one day before his Republican successor took office.[82]

Under the Feldman Plan New Jersey's fourteen congressional districts had an average population of 526,059; the largest district differed from

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[75]*Id.* at 92-99.

[76]*Kirkpatrick*, 394 U.S. at 530-31.

[77]*Id.* at 527. *But see* Karcher v. Daggett, 103 S. Ct. 2653, 2659 (1983).

[78]Karcher v. Daggett, 103 S. Ct. 2653 (1983).

[79]Torricelli and Porter, *Toward the 1980 Census: The Reapportionment of New Jersey's Congressional Districts*, 7 RUTGERS COMP. & TECH. L.J. 141 (1979). *See, e.g.*, David v. Cahill, 342 F. Supp. 463 (D.N.J. 1972) (holding that New Jersey's congressional districts, which had a total population variance of 51.54%, were patently unconstitutional).

[80]New Jersey's population increased by 2.7% from 1970 to 1980, while that of the nation as a whole increased by 11.5%. WORLD ALMANAC AND BOOK OF FACTS 207 (1983).

[81]Karcher v. Daggett, 103 S. Ct. 2653, 2657 (1983). Feldman was the President PRO TEM OF THE NEW JERSEY SENATE.

[82]N.J. STAT. ANN. §§ 19:46-4, -5 (West Supp. 1983-84).

the average by about .27%, and the smallest differed from the average by about .43%.[83] Although these variances were quite small, plans with even smaller variances had been offered to the legislature but were rejected, and the Feldman Plan became law.[84]

The Feldman Plan eliminated one Republican district, paired Republican incumbents in one district, created a new district leaning Democratic, and removed some Republican territory from the third district which had a Democratic incumbent.[85] The Feldman plan was described as a "four-star gerrymander that boast[ed] some of the most bizarrely shaped districts to be found in the nation."[86] Rather than challenge the Feldman Plan as a gerrymander, however, the plaintiffs attempted to show that the plan failed the "good-faith effort to achieve population equality" test of *Kirkpatrick*. The challengers, who included New Jersey's entire Republican congressional delegation, sought a judicial declaration that the plan violated article I, section 2 of the Constitution, and an injunction against New Jersey officials to prevent them from holding primary elections under the districts in the Feldman Plan.[87]

In the United States District Court of New Jersey, a three-judge panel, convened pursuant to federal statute,[88] denied the defendants' motion for summary judgment, and, relying largely on the two-step *Kirkpatrick* analysis,[89] held the Feldman Plan unconstitutional and granted the injunction.[90] By a thin margin, the United States Supreme Court affirmed the district court's decision.[91] Justices Brennan, Marshall, O'Connor, Blackmun and Stevens were in the majority; and Justices White, Rehnquist, and Powell, and Chief Justice Burger dissented. The sharp split of the Court is further illustrated by the number of opinions written; besides Brennan's majority opinion, Stevens wrote concurring opinion, and White and Powell each wrote dissenting opinions.

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[83]Karcher v. Daggett, 103 S. Ct. 2653, 2657 (1983). Thus, the total interdistrict population variance is .43 + .27, or about .70%.

[84]*Id. See* N.J. STAT. ANN. §§ 19:46-4, -5 (West Supp. 1983-84).

[85]CONGRESSIONAL QUARTERLY, STATE POLITICS AND REDISTRICTING PART II 20 (1982).

[86]*Id.*

[87]Karcher v. Daggett, 103 S. Ct. 2653, 2657 (1983).

[88]28 U.S.C. § 2284(a) (1982): "A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts . . . ." Note the broad usage of the word apportionment, which covers redistricting as well.

[89]*See supra* text accompanying note 66.

[90]Daggett v. Kimmelman, 535 F. Supp. 978 (D.N.J. 1982), *aff'd sub nom.* Karcher v. Daggett, 103 S. Ct. 2653 (1983). This order was stayed pending appeal, and pursuant to 28 U.S.C. section 1253, the case was appealed directly to the U.S. Supreme Court, which noted probable jurisdiction.

[91]Karcher v. Daggett, 103 S. Ct. 2653 (1983). After the Supreme Court remanded *Karcher*, the New Jersey District Court fixed February 3, 1984, as a deadline by which the New Jersey legislature was required to enact a new plan. This deadline passed and no new plan was enacted; therefore, the district court convened to choose a plan from those

A. Brennan's Two-Level Inquiry for Malapportionment

According to Justice Brennan's opinion, there are two levels of inquiry to be undertaken when the constitutionality of a state's congressional district map is challenged.[92] Initially, the burden is on the challenger to show that the state did not make a good-faith effort to achieve precise mathematical equality.[93] If the challenger carries this burden, then the burden shifts to the state to show that precise interdistrict population equality was sacrificed to achieve some other legitimate state interest.[94] If the state fails to make such a showing, the plan will be declared unconstitutional.

1. "Functional Constitutionality".—In an effort to circumvent this two-step analysis, New Jersey argued that the population of its congressional districts should be regarded as functionally equivalent and therefore exempt from the scrutiny normally present in challenges to congressional district plans.[95] New Jersey attacked the legitimacy of the census population figures which showed a comparatively large interdistrict population variance in the Feldman Plan; alternatively, New Jersey asserted that even if the census figures were correct, the variance in the Feldman Plan was small enough to be ignored.

First, New Jersey argued that there was a systematic undercount in the census that was not uniformly distributed.[96] In other words, although a state might achieve precise mathematical equality based on census figures, in reality the population of the districts would not be equal since the census could reflect neither the exact population nor the precise distribution of the population within the state. Brennan thoroughly countered this argument:

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offered by the parties involved. Plans with districts similar to the Feldman Plan's districts, but with greatly reduced population variances, were rejected by the district court in favor of a plan with more compact districts. Daggett v. Kimmelman, 580 F. Supp. 1259 (D.N.J. 1984).

The court-approved plan favored the Republican Party in New Jersey, therefore, the Democratic proponents of the Feldman Plan applied to the U.S. Supreme Court for a stay of the district court's order. This application was denied, Karcher v. Daggett, 104 S. Ct. 1691 (1984), but Justice Brennan dissented. *Id.* Brennan wrote that the district court had abused its discretion by not accepting the alternate plan which most closely resembled the Feldman Plan. The judgment of the district court was subsequently affirmed by the Supreme Court. Karcher v. Daggett, 52 U.S.L.W. 3873 (U.S. June 4, 1984) (No. 83-1526). Brennan referred to his dissent of the denial of application for stay, in dissenting to the affirmance of the district court's decision.

[92] *Id.* at 2658. Brennan repeated the test he articulated in *Kirkpatrick*.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 2660-62. For a discussion of the political ramifications of the undercount see McKay, *Constitutional Implications of a Population Undercount: Making Sense of the Census Clause*, 69 GEO. L.V. 1427 (1981).

> To the contrary, the census data provide the only reliable—albeit less than perfect—indication of the districts' "real" relative population levels. Even if one cannot say with certainty that one district is larger than another merely because it has a higher census count, one *can* say with certainty that the district with a larger census count is more likely to be larger than the other district than it is to be smaller or the same size. That certainty is sufficient for decisionmaking.[97]

Second, the state argued that because the population variances in the Feldman Plan were smaller than the margin of error in the census,[98] the districts should be treated as functionally equivalent in population.[99] However, no *de minimis*[100] figure was acceptable to Brennan, who noted that due to the arrival of computer technology, compliance with a standard of precise mathematical equality would not be burdensome.[101]

By rejecting New Jersey's theories, Brennan made it clear that the two-step analysis introduced in *Kirkpatrick* would be used in every challenge to a congressional district plan, no matter how small the plan's variance. Thus, the burden was on the challengers to show that the Feldman Plan was not the result of a good-faith effort to achieve precise interdistrict population equality, which if carried would shift the burden to New Jersey to justify the variances of the Feldman Plan.

2. Good-Faith Effort.—The challengers argued that the Feldman Plan was not a good-faith effort to achieve interdistrict population equality because other plans with smaller interdistrict population variances had been offered to the New Jersey legislature but were rejected.[102] Brennan agreed with the district court that this action by the legislature cast serious doubt on a determination that the Feldman Plan was a good-faith effort to achieve precise mathematical equality.[103] Additionally, Brennan held that the ease with which the district lines could be moved slightly to achieve smaller interdistrict population variances made it clear that the Feldman

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[97]Karcher v. Daggett, 103 S. Ct. 2653, 2662 (1983) (citation omitted).

[98]The margin of error in the 1980 census is between 1% and 2%. *Id.* at 2680 n.3 (White, J., dissenting).

[99]*Id.* at 2658-59.

[100]"*De minimis*" refers to the doctrine of *de minimis non curat lex*, or the law does not concern itself about trifles. BLACK'S LAW DICTIONARY 388 (5th ed. 1979). Thus, a *de minimis* percentage of interdistrict population variance is the point at which the Supreme Court would ignore that a variance existed at all.

[101]Karcher v. Daggett, 103 S. Ct. 2653, 2659 (1983).

[102]*Id.* at 2662.

[103]*Id.* at 2664. The Reock Plan contained a total deviation of .3250%, and only .2960% after it was amended. The DiFrancesco Plan had a total deviation of .1253%. The Hardwick Plan contained a total deviation of .4515%. The Bennett Plan had a total deviation of .1369%, and the Kavanaugh Plan had a total deviation of .0293%. Daggett v. Kimmelman, 535 F. Supp. 978, 982 (1982), *aff'd sub nom.* Karcher v. Daggett, 103 S. Ct. 2653 (1983).

Plan was not a good-faith effort.[104] Thus, the challengers carried their burden, and the burden shifted to New Jersey to justify the variances in the Feldman Plan.

3. Legitimate State Interests.—Brennan recognized that some legitimate state interests could justify the enactment of a particular redistricting plan when other plans with smaller variances were available, or could have been made available. Some permissible state interests identified by Brennan include making districts compact,[105] respecting established political boundaries, preserving the cores of prior districts, and avoiding contests between incumbent congressmen of the same party.[106]

New Jersey's only attempt to justify the deviations in the Feldman Plan was to assert that the plan preserved the voting strength of minority groups.[107] Brennan flatly rejected that argument, finding no causal link between the asserted goal and population variances in districts with little minority strength to preserve.[108] Brennan said that the showing required for a legitimate state interest was flexible, and the factors to be weighed include the size of the deviation, the importance of the state interest, the consistency with which the redistricting plan reflected the asserted interest, and the availability of alternative plans with smaller deviations.[109] Brennan was silent regarding the legitimacy of the goal of preserving minority voting strength, and the district court expressly stated that because that goal was not supported by the facts, it did not have to reach the legitimacy question.[110]

B. Problems with the Two-Level Inquiry for Malapportionment

1. Good-faith Effort.—Brennan's two-level inquiry contains both practical problems and logical inconsistencies. The burden placed on the challengers of a redistricting plan is so small as to be almost nonexistent. The challengers in *Karcher* carried their burden as to New Jersey's lack of a good-faith effort to achieve interdistrict population equality by simply showing that the Feldman Plan could be modified to achieve a lower population variance. In bolstering this notion, Brennan noted that other plans with smaller variances were rejected by the legislature.[111] In fact, it was possible to transfer entire political subdivisions between districts in the Feldman Plan and achieve a lower interdistrict population

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[104]Karcher v. Daggett, 103 S.Ct. 2653, 2665 (1983).

[105]*See supra* note 13.

[106]Karcher v. Daggett, 103 S. Ct. 2653, 2663 (1983).

[107]*Id.* at 2664.

[108]*Id.* at 2665.

[109]*Id.* at 2663.

[110]Daggett v. Kimmelman, 535 F. Supp. 978, 982, *aff'd sub nom.* Karcher v. Daggett, 103 S. Ct. 2653 (1983).

[111]Karcher v. Daggett, 103 S. Ct. 2653, 2662 (1983).

variance.[112] Thus, the Court found these factors as determinative that good-faith was not present. Because any redistricting map which does not have exact interdistrict population equality can have its variances decreased by shifting the lines slightly, the burden placed on the challenger is really no burden at all. Thus, Brennan's analysis will have the effect of requiring a state to justify *any* variance in its redistricting plan, since the absence of absolute interdistrict population equality establishes the challenger's prima facie case of lack of good-faith.

The ease with which a challenger can carry the initial *Karcher* burden will further the Supreme Court's standard of absolute interdistrict population equality. In terms of political realities, the majority party in a state legislature should realize the ease with which the minority party can overcome the burden of showing lack of good faith. The majority party can be assured that its redistricting plan will be easily challenged unless it is one whose interdistrict population variance could not be decreased; that is, a plan with an interdistrict population variance of zero.

Justice Brennan indicated that congressional district plans must be drawn in a good-faith effort to achieve interdistrict population equality,[113] and that the population variances in the plan must be unavoidable despite such an effort.[114] The unavoidability question must be answered by the state if the challenger carries the initial burden. However, Brennan implied that even if the challenger cannot show a lack of good-faith effort, the challenger may assert that the variances in the plan *were* avoidable. If this is true the intial burden of showing that the plan is not a good faith effort is mere surplusage, since whether or not this burden is met, an inquiry into the legitimacy of the reasons for the variance will be undertaken.

The result, then, of the ease with which a challenger can carry his burden, furthers the goals of the *Kirkpatrick* Court, that developed the "as nearly as practicable" doctrine. Additionally, however, any redistricting plan challenged for its interdistrict population variance must be justified by some legitimate state interest unless it has *no* variance. This result is probably not what Brennan intended, for he admitted that "[p]recise mathematical equality . . . may be impossible to achieve in an imperfect world; therefore the 'equal representation' standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality 'as nearly as is practicable.'"[115] Further, if exact population equality is really required by the Court, the two-step Brennan analysis of shif-

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[112] *Id.* at 2663.

[113] *Id.* at 2658.

[114] *Id.*

[115] *Id.* at 2658 (citation omitted). Brennan seems to contradict this idea by asserting that computer technology has made redistricting much simpler for state legislatures, so that an equal population requirement would not be overly burdensome. *Id.* at 2659.

ting burdens is meaningless, for the only issue in litigation would be whether the state could justify the variances, no matter how minute, in its plan. Apparently, if the state had districts with equal populations, the plan would be upheld, but if there were any variance the only burden in the litigation would be on the state to justify it. Thus, the slight burden Brennan has placed on potential challengers is inconsistent with his assertion that interdistrict population equality is impossible to achieve.

2. Legitimate State Interests.—Brennan's first level of inquiry is also inconsistent with his second level of inquiry: Whether a state can justify its population deviations, shown not to be the result of a good-faith effort, by demonstrating legitimate state interests. One relevant factor in assessing the causal relationship between the state interest and the specific deviations is the size of the deviation.[116] Presumably, the smaller the deviation, the more readily the court will accept the state's justification for it. Yet, this type of balancing test implies that there is some point at which any quasi-legitimate justification will be accepted. Because Brennan noted that absolute population equality is impossible to achieve, this point will be above zero variance, at some minute figure. Thus, Brennan implied that there is a *de minimis* population figure at which the state's justification will, as a matter of course, satisfy the requirement of proving a legitimate state interest. Yet, in his discussion of the challenger's initial burden, Brennan rejected a *de minimis* figure at which the state could be said to have engaged in a good-faith effort to achieve interdistrict population equality, implying that redistricting plans can be placed in only two categories: those which have no population variance, and those which have some population variance. Thus, Brennan's enunciation of a balancing test to assess the legitimacy of the state's asserted interest is inconsistent with his refusal to recognize a *de minimis* figure to raise a presumption of good-faith on the part of the state.

Brennan also identified the availability of plans with lower variances as a test to determine if the state has a legitimate interest.[117] The practical effect of such a test is to insure that any plan challenged by a plan with a lower interdistrict population variance will be struck down. One source of alternative plans is the minority party of a state legislature. After *Karcher*, these minority parties are on notice that if they offer a plan to the state legislature that embodies the basic goals of the majority party's plan, but has smaller interdistrict population variances, it will probably succeed in having the majority party's plan judicially nullified. The minority plan would carry the burden of showing the state's lack of a good-faith effort simply by showing that its plan, which embodies smaller variances, was offered to the state legislature but was rejected. In addition, because the majority plan would reflect goals similar to those in-

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[116]*See supra* text accompanying note 109.

[117]Karcher v. Daggett, 103 S. Ct. 2653, 2663 (1983).

cluded in the minority plan, the state's legitimate interests justification for its variances would be unacceptable because alternatives embodying the same values were available.[118]

The side effect of Brennan's analysis is that, in the real political world, a challenged plan with any variance will likely be struck down. Brennan, seemingly, did not desire such a result in light of his view that absolute population equality is impossible to achieve, as well as his enunciation of legislative policies that would justify some variance. Unfortunately, however, it is apparent that the practical results compelled by Brennan's two-level analysis are inconsistent with the components of the analysis itself.

C. Justice Stevens' Concern and Gerrymandering

That prior case law in the congressional redistricting area has been concerned almost exclusively with interdistrict population equality is surprising since it is but one of the requirements that had been included in early federal reapportionment statutes.[119] For example, compactness does not necessarily exist in districts with equal populations. Rather than being a constitutional requirement, however, in *Karcher* compactness was treated as a legitimate state interest that might justify some population variance.[120] That Brennan relied too heavily on population equality and failed to recognize other requirements of congressional district plans is the contention of the *Karcher* concurring and dissenting opinions.[121]

Justice Stevens, who concurred in the result in *Karcher*, suggested another constitutional basis upon which a congressional district plan could be challenged. While Brennan's holding was based on the Feldman Plan's violation of article I, section 2 of the Constitution, Stevens noted that the equal protection clause of the fourteenth amendment could be invoked to support a cause of action for gerrymandering.[122]

Stevens accepted the Brennan approach to article I, section 2 based on stare decisis, but felt that particular provision was inadequate to guarantee equality of representation.[123] Rather, Stevens said, the equal protection clause should be used in applying the one man, one vote

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[118]It is presumed that, as a practical matter, there are only a few goals that the majority could consider in drawing its redistricting plan. *See supra* text accompanying note 106. Thus, it would not be difficult for the minority party to create a plan which includes any legitimate state interests embodied in the majority's plan.

[119]*See supra* text accompanying notes 11-13.

[120]Karcher v. Daggett, 103 S. Ct. 2653, 2663 (1983).

[121]*See Id.* at 2667 (Stevens, J., concurring); *id.* at 2678 (White, J., dissenting); *id.* at 2687 (Powell, J., dissenting).

[122]*Id.* at 2669 (Stevens, J., concurring).

[123]*Id.*

standard.[124] Stevens observed that in racial bias voting cases at the state level, the Supreme Court has said that the dilution of votes of a distinct political group may be unconstitutional.[125] Extending these cases to the federal level, Stevens analogized that the equal protection clause is a guard against congressional redistricting plans which discriminate on the basis of political grouping.

Stevens demonstrated that gerrymandering and malapportionment causes of action are distinct with the assertion that a gerrymander would not be immune from constitutional attack even if the districts were of equal population:

> It is plainly unrealistic to assume that a smaller numerical disparity will *always* produce a fairer districting plan. Indeed, . . . a standard "of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues."[126]

Therefore, said Stevens, the equal population requirement must be supplemented with inquiries into the plan's adverse effect on identifiable political groups and the state's evidence that the plan serves the neutral legitimate interests of the community.[127]

1. The Cause of Action for Gerrymandering.—The cause of action for gerrymandering enunciated by Justice Stevens puts the burden on the challenger to show that he is a member of an identifiable political group and that the redistricting plan has an adverse impact on that group.[128] Additionally, the challenger must show that the redistricting plan departs from other neutral criteria.[129] Upon such a showing, according to Stevens, the burden of justification falls on the state.[130] This burden can be carried by showing that the plan embodies acceptable neutral objectives.[131]

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[124]*Id.*

[125]*See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (the Court struck down the newly created city boundaries of Tuskegee, Alabama, which excluded black voters from the city).

[126]Karcher v. Daggett, 103 S. Ct. 2653, 2671 (1983) (Stevens, J., concurring) (quoting Wells v. Rockefeller, 394 U.S. 542 (1969) (Harlan, J., dissenting)).

[127]Karcher v. Daggett, 103 S. Ct. 2653, 2670 (1983) (Stevens, J., concurring).

[128]*Id.*

[129]*Id.* at 2672.

[130]*Id.*

[131]*Id.* at 2670. These criteria include large interdistrict population deviations, irregularly shaped districts, substantial diversion from a mathematical standard of compactness, extensive deviation from established political boundaries, and discrimination in the process of formulating and adopting the plan. *Id.* at 2672-74. Apparently, statements by legislators which indicate that politics were the motivation behind formulation of the plan will not raise a presumption of discriminaton: "Legislators are, after all, politicians; it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting." *Id.* at 2671-72.

It is evident that Stevens saw the danger of a torrent of litigation if gerrymandering supported a cause of action, for he went to great lengths to make it clear that the burden on a challenger in a gerrymandering case is an extremely high one. First, Stevens stated that this burden will be carried in few cases.[132] Also, the components of the test by which the challenger carries his burden are difficult to meet. The challenger must first show that he belongs to a politically salient class whose geographical distribution is ascertainable and could have been taken into account by the state; second, he must show that his proportional voting influence has been adversely affected because this distribution either was not taken into account, or was taken into account with the purpose of adversely affecting the group; finally, the challenger must make a prima facie showing which raises a rebuttable presumption of discrimination.[133]

Stevens concluded his opinion with the caveat that due to the posture of the *Karcher* case, a challenge based on population deviations, it could not be concluded with certainty that the Feldman Plan violated the equal protection clause.[134] The plaintiffs did not raise, and the state did not have the opportunity to offer justifications for, the characteristics of the Feldman Plan which might indicate the existence of a gerrymander.[135] Stevens did note, however, that the Feldman Plan's lack of compactness, the fact that county boundaries were ignored, and the obvious political motivation in the drafting of the plan strongly indicated the existence of a constitutional violation.[136] Thus, since four other justices were willing to strike down the plan on the basis of *stare decisis*, Stevens concurred.[137]

2. Problems with the Cause of Action for Gerrymandering.—Due to the onerous burden Stevens has put on challengers, as well as his failure to expand on how political groups must be taken into account by state legislatures, the practical value of his cause of action for gerrymandering is questionable. Stevens has made the burden so heavy for those challenging an alleged gerrymander,[138] relief will only be available in a small number of cases where there is a blatant gerrymander. Because the Brennan approach will prompt legislatures to enact plans with zero interdistrict population variances, one method articulated by Stevens for the challenger to carry his burden in a gerrymander case, evidence of interdistrict population variance, is not useful. In fact, even if the challenger shows that

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[132]*Id.* at 2672.

[133]*Id.*

[134]*Id.* at 2677.

[135]*Id.*

[136]*Id.* at 2676. Stevens gave two examples of bizarrely shaped districts in the Feldman Plan: the "swan" (district five), and the "fish hook" (district seven). *Id. See infra* Appendix A, p. 683.

[137]Karcher v. Daggett, 103 S. Ct. 2653, 2667 (1983).

[138]*See supra* text accompanying notes 132-33.

the plan has interdistrict population variances, that alone would probably be insufficient to carry the burden of proving a gerrymander. Courts will likely invalidate such a plan only on the basis of an article I, section 2 malapportionment violation, and such invalidation would not necessarily vindicate the voting rights of salient political groups claiming an equal protection violation. Thus, the gerrymander challenger must rely on irregularities in the map itself and its effect on the political group involved to carry his burden.

It is, however, Stevens' failure to identify how these salient political groups must be taken into account by a state legislature to ensure that it has not enacted a gerrymander that most undermines the value of the gerrymander cause of action. Stevens gave examples of salient political groups, saying that they may be based on political affiliation, race, ethnic group, national origin, religion, or economic status.[139] The geographical distribution of these groups is revealed in many cases by the decennial census, and thus they may be taken into account by the state legislature when it draws new congressional districts. The ability of a challenger to show discrimination if these groups are not taken into account by the state in redistricting seems to create a duty on the part of the state to consider all of these groups in the process of drawing congressional districts.

While such a duty may be desirable, though extremely burdensome, the problem facing the state is *how* to take these groups into account during the redistricting process. For example, if disgruntled Republicans challenge an alleged gerrymander by the Democrats, and if the challenge is successful, the guidelines the state legislature should use in drawing a new map are unknown. It would be unwise to require that the number of districts under the control of the state's majority party be limited to the percentage of state voters in that party. For example, this would require a state which is sixty percent Republican to have a redistricting plan which would assure that party of winning no more than sixty percent of the districts. Such a requirement neither takes into account independent voters, nor the fact that people do not always vote for the candidate of their party. Not only would such a requirement fail to guarantee the desired split in the congressional delegation, it would also thwart the idea of a representative government even more than gerrymandering. Because the minority party would be guaranteed a certain percentage of the districts, the court in essence would determine the make-up of the House of Representatives, thereby engaging in judicial gerrymandering.[140]

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[139]Karcher v. Daggett, 103 S. Ct. at 2672 n. 12 (1983) (Stevens, J., concurring).

[140]Though it is true the majority party in state legislatures have, theoretically, the power to determine the political makeup of the House, this power is contingent on the electorate voting as the majority party projected when they drew the redistricting map. This safeguard is not present under a duty to take political groups into account, since the state must then guarantee the minority party a certain percentage of seats under its plan. Such a duty is patently unworkable.

Another difficulty with Stevens' approach is that he did not limit the definition of "salient political groups" to race, religion, or political party, but said that other characteristics may become politically significant in a particular context.[141] Thus, any significant special-interest group whose geographic distribution is ascertainable must be considered by the legislature in order to ensure that the plan is not a gerrymander. Again, it is unclear how these groups are to be taken into account. The interest group example illustrates the two principal problems with gerrymandering as a cause of action. First, it is naive to expect the majority party to pass a congressional district plan not based on the assumption that it would favor that party, as even Stevens recognized.[142] However, Stevens went no further in concretely identifying conduct by the legislature which would give rise to a prima facie showing of gerrymandering. Indeed, it is the map itself upon which Stevens relied in formulating the characteristics of a gerrymander.[143] Since, in most states, it is impossible to make every district competitive between Democrats and Republicans due to the uneven statewide distribution, a plan favoring one party will almost inevitably disfavor the other. Stevens did not identify the degree of disfavor that would be tolerated by the Constitution.

Second, requiring the state legislature to consider the geographic distribution of salient political groups is a vague and unworkable requirement. If the state recognizes the geographical distribution of a political interest group by including its members in a restricted number of districts, thus giving the group a better chance to win representation in the House, the group could claim that its voting power had been diluted in the other districts. Stevens said that "in case after case arising under the Equal Protection Clause the Court has suggested that 'dilution' of the voting strength of cognizable *political* as well as racial groups may be unconstitutional."[144]

Alternatively, if the state legislature assigns to several districts a percentage of persons representing the political group, to reflect the overall state percentage of that group, the group could claim uniform vote dilution, and a gerrymander cause of action would again arise. As a practical matter, the only course left open to the legislature is to ignore the distribution of the group, but this action squarely contravenes the duty of the state, as implied by Stevens, to take into account those salient political groups whose existence and geographic distribution are ascertainable by the legislature.

Another problem with the gerrymander cause of action is the required level of review of challenged congressional disctrict plans. Stevens made it clear that only the most blatant gerrymanders will be struck down,[145]

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[141]Karcher v. Daggett, 103 S. Ct. 2653, 2672 n.12 (1983) (Stevens, J., concurring).

[142]*Id.* at 2671-72.

[143]*Id.* at 2672-75.

[144]*Id.* at 2669.

[145]*Id.* at 2672 (Stevens, J., concurring).

implying that a challenged gerrymander will carry a strong presumption of constitutionality. Given that the equal protection clause is the basis for the gerrymander cause of action, this blanket deference is inconsistent with the traditional method of inquiry the Supreme Court has developed to review such challenges. This method consists of three levels of inquiry in equal protection clause cases: strict scrutiny, middle level scrutiny, and lower level scrutiny.[146]

The review which accords the state the least deference is strict scrutiny, which occurs in cases involving fundamental rights[147] or suspect classifications.[148] In *Reynolds v. Sims*,[149] the Court identified the right not to have one's vote for a state legislator diluted as a fundamental right. The alleged abridgement of that right, then, would demand strict scrutiny to determine the challenged law's constitutionality. Unless the Court finds that this fundamental right does not exist with respect to the vote for a congressman, strict scrutiny should be invoked where there is an equal protection challenge to a congressional district plan. The deference Stevens is willing to give the state in gerrymander cases does not comport with strict scrutiny.

Similarly, where the gerrymander cause of action is brought by a racial minority, courts must apply strict scrutiny to comply with earlier decisions.[150] A congressional district plan which does not treat minorities equally, then, should only be upheld if the plan was necessary to achieve some compelling state interest.[151] Again, a presumption of constitutionality should not arise, as it is inconsistent to defer to the state by invalidating only the most blatant gerrymanders.

Similarly, the error of Stevens' use of one standard of review is demonstrated by the Court's use of two other standards, besides strict scrutiny, when a law is challenged as violative of the equal protection clause. For example, if a gerrymander is challenged on the theory that it did not treat women equally, it would probably be subject to middle level scrutiny,[152] which is more rigorous than lower level scrutiny, but more deferential than strict scrutiny.[153] The review called for by Stevens

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[146]J. NOWAK, R. ROTUNDA, & J. N. YOUNG, CONSTITUTIONAL LAW 591-93 (1983) [hereinafter cited as J. NOWAK].

[147]*Id. See, e.g.*, Kramer v. Union Free School District, 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy).

[148]Suspect classifications include race, Brown v. Board of Education, 347 U.S. 483 (1954); and national origin Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[149]377 U.S. 533 (1964).

[150]*See supra* note 148.

[151]*See* Korematsu v. United States, 323 U.S. 214 (1944).

[152]Middle level scrutiny is usually applied in sex-discrimination cases. *See* Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

[153]Middle level scrutiny involves evaluating the law's substantive relationship to a governmental interest. J. NOWAK, *supra* note 146 at 592-93.

in gerrymander cases seems to be lower level scrutiny, which demands only that the means used by the legislature be reasonably related to its purpose.[154]

Thus, in order to be consistent with equal protection clause analysis, the deference given to congressional district plans challenged as gerrymanders should depend largely on two circumstances: first, whether the Court extends the fundamental right of *Reynolds* to congressional district plans, and second, whether different challengers must be afforded different levels of scrutiny. It may be that these levels of scrutiny will be applied when evaluating the neutral criteria of the plan, but it is inconsistent with traditional equal protection analysis to assert that after these criteria are evaluated, only the most blatant gerrymanders will be struck down.

These criticisms of the gerrymander cause of action are made with the realization that Stevens, in proposing it, was navigating in unchartered waters. It may be that future litigation will refine this cause of action to the point where it will be a workable one. However, as articulated by Stevens, it is not.

D. The Kracher *Dissenters*

The Brennan approach in redistricting cases is more inclined to prompt states to meet the standard of zero population variance than the Stevens approach. The four dissenters in *Karcher*, however, felt that exact population equality was too strict a requirement.[155] The contention that exact interdistrict population equality is impossible to achieve is untenable in light of advances made in computer technology.[156] It is likely that the true concern of the dissenters was that traditional boundary lines such as those surrounding cities and counties would have to be sacrificed in order to achieve such precision:

> The more likely result of today's extension of *Kirkpatrick* is to move closer to fulfilling Justice Fortas' prophecy that "a legislature might have to ignore the boundaries of common sense, running the congressional district line down the middle of the corridor of an apartment house or even dividing the residents of a single-family house between two districts."[157]

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[154]*Id.* at 591.

[155]Karcher v. Daggett, 103 S. Ct. 2653, 2678 (1983) (White, J., dissenting) and *id.* at 2687 (Powell, J., dissenting).

[156]For a discussion of how computer technology can be used to *prevent* gerrymanders see Torricelli and Porter, *supra* note 79 (Computers can be used to draw compact districts with no interdistrict population variance, but the prevention of gerrymanders also requires the removal of the redistricting process from partisan legislators and creating an apportionment commission).

[157]103 S. Ct. at 2682 (White, J., dissenting) (quoting Fortas, J., in Kirkpatrick v. Preisler, 394 U.S. at 538).

The more interesting aspect of the *Karcher* dissents is, however, that they agreed with Justice Stevens that gerrymandering is as important a problem, if not more so, than interdistrict population variance. Justice White said that "[o]ne must suspend credulity to believe that the Court's draconian response to a trifling 0.6984% maximum deviation promotes 'fair and effective representation' for the people of New Jersey."[158] White added that it would be a different matter if the plan discriminated against a racial or political group because such discrimination *is* a legitimate reason to hold that a redistricting plan is unconstitutional.[159] Justice Powell's dissent recognized the extraordinary shape of New Jersey's congressional districts,[160] and opined that injuries in voter representation that result from gerrymandering "may rise to constitutional dimensions."[161]

The significance of the dissenters' agreement with Stevens as to the recognition of the gerrymander cause of action is that there are at least five members of the Court,[162] a majority, willing to recognize that cause of action. Thus, although *Karcher v. Daggett* is a population equality case, it also stands for the proposition that gerrymandering may give rise to a separate cause of action. Those challenging a state's congressional district map, then, can do so on two theories: that the population variances in the plan violate article I, section 2, and that the gerrymandering characteristics violate the equal protection clause.

IV. *Karcher:* The Indiana Congressional District Map

The results of the 1980 census revealed that the State of Indiana had a population of 5,490,224.[163] Although the state's population had increased by 5.7% since 1979,[164] it had increased at a slower rate than other sections of the country.[165] After the 435 congressional seats were reapportioned, Indiana lost one seat, placing its congressional delegation at ten. Therefore, when the Indiana legislature drew new districts, an entirely new map was necessary.

A. The Sutherlin Plan

The Republican-controlled Indiana General Assembly began work on a new map in January, 1981.[166] The congressional district map adopted

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[158]Karcher v. Daggett, 103 S. Ct. at 2653, (1983) (White J., dissenting).

[159]*Id.* at 2686 (White, J., dissenting).

[160]*See* Appendix A p. 683.

[161]Karcher v. Daggett, 103 S. Ct. 2653, 2689 (1983) (Powell, J., dissenting).

[162]C.J. Burger, JJ. Stevens, White, Powell, and Rehnquist.

[163]United States Census Bureau, Number of Inhabitants—Indiana (1981).

[164]World Almanac and Book of Facts 207 (1983).

[165]The eight states with the greatest percentage of increased population from 1970 to 1980 are: Nevada (63.5%), Arizona (53.1%), Florida (43.4%), Wyoming (41.6%), Utah (37.9%), Alaska and Idaho (32.4%), and Colorado (30.7%). *Id.*

[166]Congressional Quarterly, State Politics and Redistricting Part I 113 (1982)[hereinafter cited as State Politics and Redistricting Part I].

by the legislature[167] was drawn by Allan Sutherlin, the former Secretary of the Indiana Republican State Committee, and was passed on the last day of the legislative session after a plan introduced by the Democrats was rejected.[168] The latter plan had smaller interdistrict population variances than the Sutherlin Plan, and split only one county.[169]

The Sutherlin Plan contains ten districts whose average population is 549,022.[170] The most populous district, the third, has a population of 558,100.[171] The least populous district, the sixth, has a population of 540,939.[172] Thus, the interdistrict population variance is 17,161 people, or about 2.4%.[173] Additionally, the Sutherlin Plan splits thirteen of Indiana's ninety-two counties,[174] as well as the city of Bloomington.

At the time of the creation of the Sutherlin Plan, there were seven Democratic and four Republican Indiana congressmen.[175] The plan divided Democrat Floyd Fithian's district among four new districts, effectively splitting his old constituency and leaving him without a district in which to run.[176] The same result was achieved with Democrat Dave Evans' district, and he subsequently ran against another incumbent Democrat, Andy Jacobs, Jr., in the primary.[177] Of the ten redrawn districts, only the districts of Jacobs, Benjamin, and Hamilton were considered safely Democratic, thus, the Republican Party stood a fair chance of capturing seven of the ten seats;[178] they succeeded in winning only five, however, in the 1982 election.[179]

After the Sutherlin Plan was signed into law, the President Pro Tem of the Indiana Senate and the Indiana House Speaker, both Republicans, filed suit in state court in an effort to establish the constitutionality of the plan.[180] The plaintiffs' counsel asserted that the lawsuit was designed

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[167]Act of May 5, 1981, 1981 Ind. Acts, Pub. L. No. 18, § 1 to -15 (1982).

[168]STATE POLITICS AND REDISTRICTING PART I, *supra* note 166, at 113 (1982).

[169]*Id.*

[170]*See* Appendix C, p. 685. Since the population of Indiana was 5,490,224, and it had ten congressional districts, Indiana's average sized congressional district is actually 549,022.4.

[171]CONGRESSIONAL QUARTERLY, CONGRESSIONAL DIRECTORY OF THE 98TH CONGRESS 67.

[172]*Id.*

[173]Indiana's variance is the seventh greatest of the 44 states with more than one congressional district. *See supra* note 74.

[174]The split counties are Lake, Porter, Laporte, Kosciusko, Delaware, Henry, Rush, Monroe, Marion, Fayette, Washington, and Crawford. *See* Appendix C, p. 685.

[175]The Democrats were Adam Benjamin, Phil Sharp, Floyd Fithian, Lee Hamilton, Andrew Jacobs, Jr., and Dave Evans. The Republicans were John Hiler, Dan Coats, Elwood Hillis, John Meyers, and Joel Deckard. STATE POLITICS AND REDISTRICTING PART I, *supra* note 166, at 115.

[176]*Id.* at 112.

[177]*Id.* at 112-13.

[178]*Id.*

[179]Republicans won the third, fourth, fifth, sixth, and seventh districts.

[180]Indianapolis News, Aug. 25, 1981, at 21, col. 4. The *state* legislative districts concurrently enacted by the Indiana legislature are the subject of litigation that is still pending in federal court. Bandemeer v. Davis, IP 82-56-C; NAACP v. Orr, IP 82-1669-C, (con-

to avoid the confusion which frequently accompanied judicial changes in redistricting plans made close to election time.[181] The suit was removed to federal district court, and was later dismissed after the Democratic defendants failed to raise any issues.[182] While this preemptive court action by the Republicans was unusual, it reflects the great uncertainty under which state legislatures enact redistricting plans since the courts' increased involvement in the process following *Baker v. Carr*. The impetus of this uncertainty is that, nationwide, between twenty-five and thirty-five percent of current House district lines were drawn by courts.[183]

B. The Sutherlin Plan under Karcher

Thus, the constitutionality of the Indiana congressional district map was not determined. An analysis of the background and passage of the plan, as well as the characteristics of the map itself, indicate how the Sutherlin Plan would fare under the doctrines presented in *Karcher v. Daggett*.

1. Malapportionment Analysis.—Using the article I, section 2 theory of constitutional violation based on interdistrict population variances, the challenger has the burden of showing that the plan was not the result of a good-faith effort to achieve interdistrict population equality.[184] Because this burden can be carried by showing that plans with smaller population variances were proposed to, but rejected by, the state legislature,[185] such evidence fulfills the plaintiff's prima facie requirements. Therefore, if Indiana's congressional district map were the subject of litigation, the challenger's burden could be carried, since before the Sutherlin Plan was adopted, the Indiana General Assembly rejected an alternative plan with smaller population variances.[186] That such a plan was rejected would be viewed as strong evidence of a lack of a good-faith effort to achieve population equality.[187]

The other factor identified by Brennan in *Karcher* with respect to good faith was the ease with which the interdistrict population variances in the plan could have been reduced.[188] In an effort to assess the difficulty

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solidated challenges based on the equal protection clause). *Bandemeer* alleges vote dilution of Democrats, and *NAACP v. Orr* alleges vote dilution of blacks.

[181]Indianapolis News, Aug. 25, 1981, at 21, col. 6.

[182]*Id.* at col. 3. It also appears that the defendants did not have enough money to pay their lawyer. *Id.*

[183]Karcher v. Daggett, 103 S. Ct. 2653, 2684 (1983) (White, J., dissenting) (quoting AMERICAN BAR ASSOCIATION, CONGRESSIONAL DISTRICTING 20 (1981)).

[184]*See supra* text accompanying note 93.

[185]*See supra* note 103 and accompanying text.

[186]*See supra* text accompanying note 169.

[187]*See supra* note 99 and accompanying text.

[188]*See supra* text accompanying note 104.

of achieving interdistrict population equality in Indiana, this author redrew the Indiana congressional districts using population figures which were only reduced to the township level.[189] The result of this effort[190] was a decrease in the total interdistrict population variance from 2.4% to .28%, a ninety percent reduction. Given that legislatures have access to computers, while the author redrew the district manually, it would clearly have been quite easy for the Indiana legislature to greatly reduce the interdistrict population variances contained in the Sutherlin Plan. Thus, based on the analysis of the *Karcher* plurality, the Sutherlin Plan is not a good-faith effort to achieve interdistrict population equality.

As the *Karcher* Court pointed out, however, the showing of a lack of good-faith effort to achieve interdistrict population equality does not mean that the plan is unconstitutional; it merely shifts the burden to the state to justify the deviations.[191] *Karcher* makes clear that every deviation in every district must be justified. Four examples of legitimate state interests which may justify a deviation were supplied by the Court.[192]

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[189]UNITED STATES BUREAU OF THE CENSUS, NUMBER OF INHABITANTS—INDIANA (1981).

[190]The author's redrawn districts are: *One*: Lake County (except Eagle Creek, Cedar Creek, and Winfield townships), and Portage Township of Porter County. Population: 548,944. *Two*: Lake county (remainder), Porter County (remainder), Newton, Benton, White (except Round Grove and Prairie townships), Pulaski, Laporte, Jasper, Warren (Pine and Prairie townships only), Starke (except Washington and North Bend townships), and St. Joseph counties. Population: 548,911. *Three*: Elkhart (except Locke township), Steuben, Lagrange, De Kalb, Noble, Allen, and Adams (Union township only) counties. Population: 548,834. *Four*: Marshall, Fulton, Miami, Grant, Huntington, Blackford, Jay (except Jefferson, Madison, and Pike Townships), Elkhart (Locke township only), Kosciusko, Whitley, Cass (except Clinton, Washington, Tipton, Deer Creek, and Jackson townships), Wabash, Wells, Adams (except Union township), Howard (except Ervine and Monroe townships), and Starke (Washington and North Bend townships only) counties. Population: 548,362. *Five*: White (Round Grove and Prairie townships), Carroll, Cass (remainder), Howard (Ervine and Monroe townships only), Tippecanoe, Clinton, Tipton, Boone (except Sugar Creek, Jefferson, and Jackson townships), Hamilton, and Marion (Pike, Washington, and Lawrence townships only). Population: 548,877. *Six*: Posey, Gibson, Vanderburgh, Warrick, Pike, Spencer, Knox, Daviess, Martin, Dubois, Perry, Lawrence, Orange, Crawford, Washington, and Sullivan counties. Population: 549,652. *Seven*: Vigo, Clay, Owen, Greene, Monroe, Morgan, Brown, Vermillion, Parke, Putnam, Hendricks, Fountain, Montgomery, Warren (except Pine and Prairie townships), and Boone (Sugar Creek, Jefferson, and Jackson townships only) counties. Population: 548,908. *Eight*: Harrison, Floyd, Clark, Scott, Jackson, Bartholomew, Jennings, Jefferson, Ripley, Dearborn, Ohio, Switzerland, Decatur, Franklin, Johnson, and Shelby (Sugar Creek, Hendricks, Jackson, and Washington townships only) counties. Population: 549,018. *Nine*: Marion (Wayne Center, Warren, Decatur, Perry, and Franklin townships only), Hancock (Sugar Creek township only), and Shelby (Moral and Brandywine townships only) counties. Population: 549,875. *Ten*: Madison, Delaware, Randolph, Henry, Wayne, Jay (Jefferson, Madison, and Pike townships only), Fayette, Union, Rush, Hancock (except Sugar Creek), and Shelby (remainder) counties. Population: 548,843. Average deviation from the average, .049%. Total deviation: .28%. *See infra* Appendix D, p. 686.

[191]Karcher v. Daggett, 103 S. Ct. 2653, 2663 (1983).

[192]*See supra* text accompanying note 106.

The first of these legitimate state interests is the effort to make districts compact.[193] That the population variances in the Sutherlin Plan are not due to an effort to make the districts compact can be shown in two ways. First, an examination of the map reveals that some of the districts in the Sutherlin Plan are not at all compact.[194] The second, eighth, and ninth districts are especially irregular. Second, the plan drawn by the author,[195] which incorporates much smaller interdistrict population variances, contains districts as compact, if not more so, than those in the Sutherlin Plan. The desire for compactness, then, does not justify the Sutherlin Plan's population variances.

The second legitimate state interest identified in *Karcher* is that of respecting established political boundaries. The pursuit of this interest also does not justify the variances in the Sutherlin Plan. First, if the Indiana legislature were truly concerned with respecting municipal and county boundaries, it could have accepted a plan like the Democratic one, which split only one county—the Sutherlin Plan splits thirteen.[196] In addition, the author's plan illustrates that much smaller variances could have been achieved by splitting only one more county than in the Sutherlin Plan.[197] Finally, the Sutherlin Plan splits the city of Bloomington in half, a result the author's map shows to be unnecessary. Clearly, the justification for the variances in the Sutherlin Plan cannot be claimed in respecting established political boundaries.

The third legitimate state interest identified by the *Karcher* Court is preserving the cores of prior districts. An examination of the congressional district map in effect before the Sutherlin Plan was adopted[198] reveals that the Sutherlin Plan did preserve the cores of the first, third, fourth, seventh, eighth, and ninth districts. While it might be argued that because Indiana lost one district in 1980, it would be difficult to preserve the cores of all of the old districts; the fact that the districts whose cores were not preserved (the second, sixth, fifth, and tenth) had significant population variances from the average[199] illustrates that the preservation of the cores of the old districts was not the reason for the variances in the Sutherlin Plan. Additionally, because Brennan said in *Karcher* that the state interest offered as a justification must be consistently applied,[200] the fact that some districts whose cores were not preserved still had substantial variances eclipses the legitimacy of this justification.

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[193]*See supra* note 12.

[194]*See* Appendix C, p. 685.

[195]*See supra* note 179 and Appendix D, p. 686.

[196]*See supra* note 174.

[197]Lake, Porter, White, Warren, Starke, Elkhart, Adams, Jay, Cass, Howard, Boone, Marion, Shelby, and Hancock counties are split in the author's map.

[198]*See* Appendix B, p. 684.

[199]The second district has a population which is 4000 people above the average, while the sixth and tenth districts are about 10,000 people below the average.

[200]Karcher v. Daggett, 103 S. Ct. 2653, 2663 (1983).

The fourth goal mentioned by the *Karcher* Court is avoiding contests between two incumbents. While the decrease in Indiana's apportioned congressional delegation meant that one incumbent would have to lose, the Sutherlin Plan effectively caused the defeat of two Democratic congressmen—Evans and Fithian.[201] Thus, the Sutherlin Plan created contests between incumbents, and the justification of avoiding such contests could not be used to vindicate the variances in that plan.

The justification offered unsuccessfully by New Jersey, preserving the voting strength of minorities, would also fail as a justification for variances in the Sutherlin Plan. The two districts in the latter plan with the smallest precentage of blacks, the seventh, and ninth, have district populations that vary by over 10,000 people.[202] Again, because any justification offered must be consistently applied throughout the map, preserving the voting strength of minorities, if offered as the sole justification would fail. Finally, an attempt to offer the justification of preserving the voting strength of minorities in tandem with another justification would fail, because the other justifications themselves would fail.

The legitimate state interests identified by the Court in *Karcher*, then, would not justify the interdistrict population variances which exist in the Sutherlin Plan. Though it is true that the Court did not limit the possible justifications to the examples given,[203] it must be remembered that because an alternative to the Sutherlin Plan was available, and because the variances in the plan are high compared with those of other states,[204] the showing of the legitimate state interest must be especially strong.[205]

Indiana's lack of justification for the Sutherlin Plan's variance is further bolstered by the boldness of the mapmakers in identifying their overriding concerns in the redistricting process. Some Republican legislators admitted during the redistricting process that they would do all that was possible to undermine the Democrats.[206] Such assertions diminish the probability that Indiana could justify the variances in the Sutherlin Plan for two reasons. First, the statements indicate that none of the legitimate state interests identified by the *Karcher* Court are embodied in the plan. Second, an assertion that the state interest served by the plan was to allow the majority party to serve its own best interests would not succeed in justifying the variances in the Sutherlin Plan, since Brennan required that any justification offered must be nondiscriminatory.[207] Thus, it is highly probable that the Sutherlin Plan would not survive an article I, section 2 constitutional attack as formulated in *Karcher*.

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[201] *See supra* note 176.

[202] *See supra* note 188.

[203] Karcher v. Daggett, 103 S. Ct. 2653, 2663 (1983).

[204] *See supra* note 74.

[205] *See supra* note 109 and accompanying text.

[206] Indianapolis Star, March 22, 1981, § II, at 3, col. 1.

[207] Karcher v. Daggett, 103 S. Ct. 2653, 2663 (1983).

2. Gerrymander Analysis.—Not only would the assertions of Indiana Republican legislators regarding the motives behind the Sutherlin Plan fail to serve as a justification for the plan's interdistrict population variance, they might also prompt a constitutional attack based on the cause of action discussed in *Karcher*'s concurring and dissenting opinions, gerrymandering.

In his formulation of the cause of action for gerrymandering, Justice Stevens indicated that the initial burden for the challenger is difficult to overcome.[208] For the purposes of analyzing the success or failure a gerrymander claim would have against the Sutherlin Plan, it will be assumed that the challenger would be the Indiana Democratic Party.[209] Also, because this cause of action had not been recognized before *Karcher*, it is unclear how the nine justices would formulate the burdens and tests to be used: the five members of the Court[210] who recognized gerrymandering as a cause of action did so in three distinct opinions. Since the only indication of these factors was in Justice Stevens' opinion, his enunciation of the cause of action for gerrymandering will be used for analysis.[211]

First, the Democratic Party is an identifiable political group. Certainly, the Indiana legislature was aware that there were such persons as Indiana Democrats because at the time the congressional map was adopted there were eighteen Democrats in the Indiana Senate and thirty-seven in the House.[212] Statements made by Republican legislators indicated that the geographic distribution of Democrats was known by the legislature, and was taken into account in an effort to weaken their political effectiveness.[213] Therefore, these distribution figures could have been used to prevent a gerrymander from occurring.

Making the necessary showing that its voting strength had been diluted would be a more difficult task for the Democratic Party than showing that it is an identifiable political group, for it is unclear what kind of showing is required. The statements of Republican legislators are some evidence of intent to dilute Democratic voting strength, but the dilution itself must be shown. If the Democratic Party could show that the Sutherlin Plan makes it impossible for Democrats to elect any members of their party to Congress, that showing would be sufficient to demonstrate vote

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[208]*See supra* note 132 and accompanying text.

[209]This assumption is made due to the clear intent of Republican legislators to deplete Democratic strength as much as possible. That is, it is probable that the Indiana Democratic Party is the political group most adversely affected by the Sutherlin Plan. Whether a challenge by a racial minority might influence the Court to invoke a stricter standard of review is unclear given Stevens' assertion that only blatant gerrymanders will be struck down. *See supra* text accompanying notes 145-54.

[210]Stevens, White, Powell, Rehnquist, Burger.

[211]*See supra* text accompanying notes 127-32.

[212]INDEX TO INDIANA SENATE AND HOUSE JOURNALS 1, 33 (1982).

[213]*See supra* text accompanying note 206.

dilution. However, the minimum seats "guaranteed" to the Democrats under the plan before a dilution claim would fail is unknown. Because the Democrats are virtually guaranteed three congressional seats in the Sutherlin Plan, and because five Democrats, or half of Indiana's delegation, were elected to Congress under the plan in 1982, the Democratic Party would probabaly fail in an attempt to show vote dilution under the Sutherlin Plan.

Furthermore, the challengers must also make a prima facie showing that raises a rebuttable presumption of discrimination. While the statements of Republican legislators regarding their intent to undermine the Democrats, as well as the fragmentation of two formerly Democratic districts, comprise extrinsic evidence of discrimination by the Republican legislative majority, Stevens relied almost exclusively on the structure of the map itself as the means by which such a presumption could be raised. One indication of gerrymandering mentioned by Stevens, the existence of interdistrict population variance,[214] would be insufficient by itself to raise a presumption of discrimination since the Court would probably invalidate the plan on the basis of malapportionment, rather than gerrymandering. Such an invalidation would not necessarily remove the harm of which the Democrats complain, since exact interdistrict population equality and gerrymandering are compatible.

Further, although some of the districts in the Sutherlin Plan lack a high degree of compactness,[215] they are not nearly as irregular as the shapes in the Feldman Plan.[216] Indeed, the districts that are somewhat irregular in Indiana's congressional district map seem to have been drawn in an effort to minimize the number of counties which were split. Thus, irregularities in the structure of the districts in the Sutherlin Plan would not be considered extraordinary enough to raise a rebuttable presumption of discrimination, particularly in light of Stevens' desire that only blatant gerrymanders be struck down.[217]

Because Indiana Democrats could not demonstrate either vote dilution or a sufficient deviation from neutral criteria[218] to raise a rebuttable presumption of discrimination, an attack of the Sutherlin Plan on the basis of its being an unconstitutional gerrymander would fail. This conclusion is based, however, on the burdens and test enunciated by Justice Stevens in *Karcher* in formulating this new cause of action. Further refinement of the gerrymander cause of action could result in a new set of burdens and tests which might compel a different conclusion.

The effect of *Karcher v. Daggett* on the Indiana congressional map, if it were challenged, would depend upon the theory of invalidation chosen

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[214]*Karcher v. Daggett*, 103 S. Ct. 2653, 2670 (1983).

[215]*See* Appendix C, p. 685, note particularly the second, fifth, eighth, and ninth districts.

[216]*See* Appendix A, p. 683.

[217]*See supra* text accompanying note 136.

[218]*See supra* note 129.

by the challenger. Under the "as nearly as practicable" standard as set out in Brennan's two-level inquiry, Indiana's Sutherlin Plan would be struck down: the population variance involved, nearly four times as large as the variance involved in *Karcher*, is unjustified, and could easily have been avoided. If attacked as an unconstitutional gerrymander, however, the Sutherlin Plan would not be struck down by the Supreme Court. Although there is some extrinsic evidence that gerrymandering was on the minds of some Hoosier Republican legislators, the results of the 1982 congressional election under the Sutherlin Plan, and the structure of the map itself, undermine the possibility of a challenger showing the existence of vote dilution or of raising a rebuttable presumption of discrimination. Both were required of the challenger by Stevens' formulation of the gerrymander cause of action.

V. Conclusion

Karcher v. Daggett is a landmark congressional redistricting case for two reasons. First, the requirement that interdistrict population variances be mimimized "as nearly as practicable" was enforced against a state whose congressional district plan embodied smaller deviations than the Court had ever considered unconstitutional before, paving the way for precise mathematical equality in all of the districts of the House of Representatives, which furthers the goal of equal representation. Second, a majority of the Court recognized that a claim of gerrymandering would support an alternative cause of action against a state and its congressional district plan.

Thus, those who use the *Karcher* decision to challenge a state's congressional district plan have two constitutional theories under which to bring a claim: article I, section 2 for malapportionment, and the equal protection clause of the fourteenth amendment for gerrymandering. Indiana's congressional district plan would not survive a malapportionment attack, but would survive a gerrymandering attack, where the burdens on the challenger are much greater.

The *Karcher* decision should please those who have demanded exact interdistrict population equality from congressional district plans, as well as those who assert that there are other interests that the Supreme Court should recognize. In either case, *Karcher* sends a powerful message to state legislatures: the Court will not hesitate to enter into the redistricting process if malapportionment or gerrymandering occurs. This check on the redistricting process is a healthy one in light of the conflict of interest which abounds between the ability of state legislators to create the districts and the desire of state legislators to maintain or increase their political power.

William B. Powers

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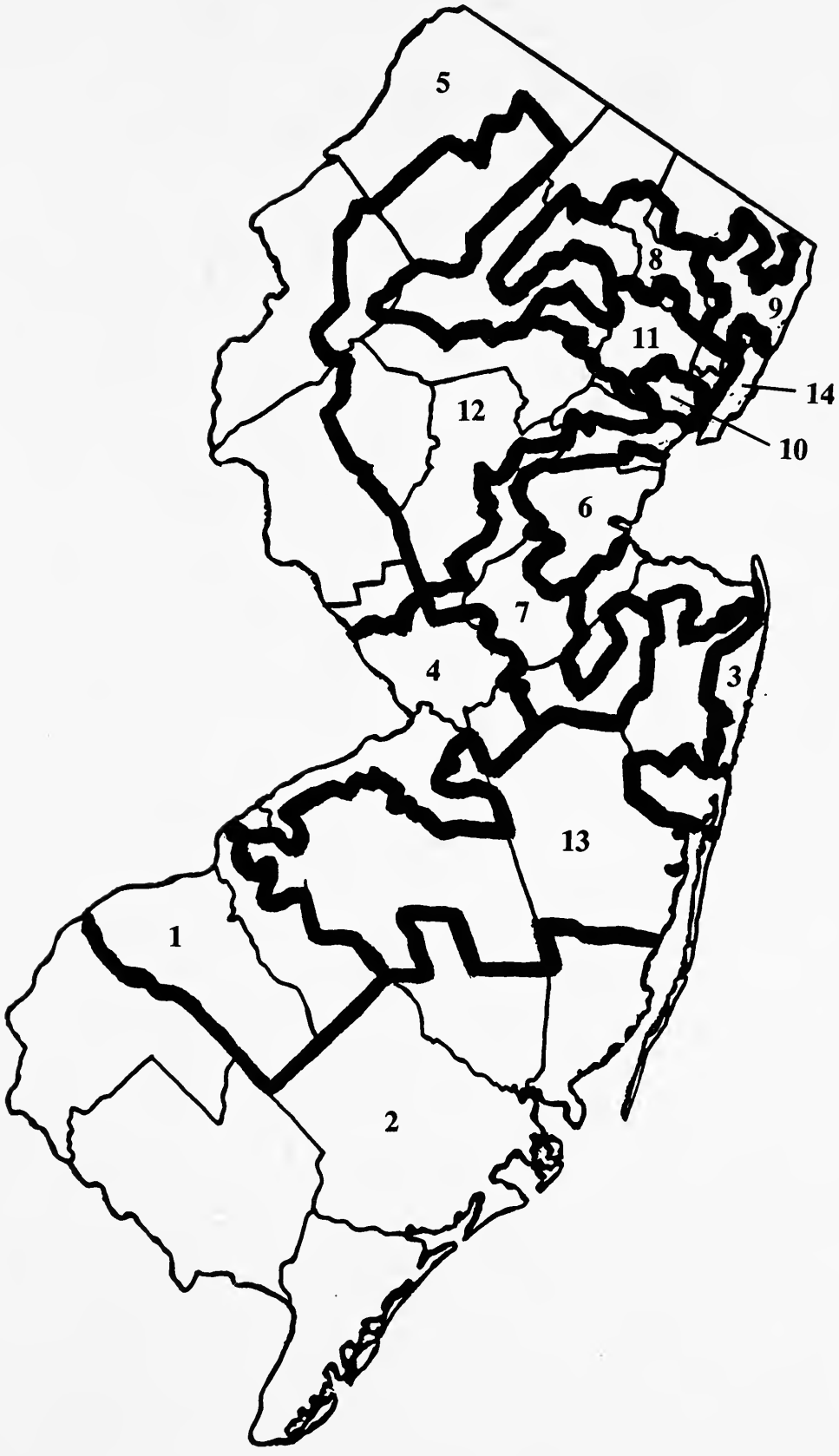
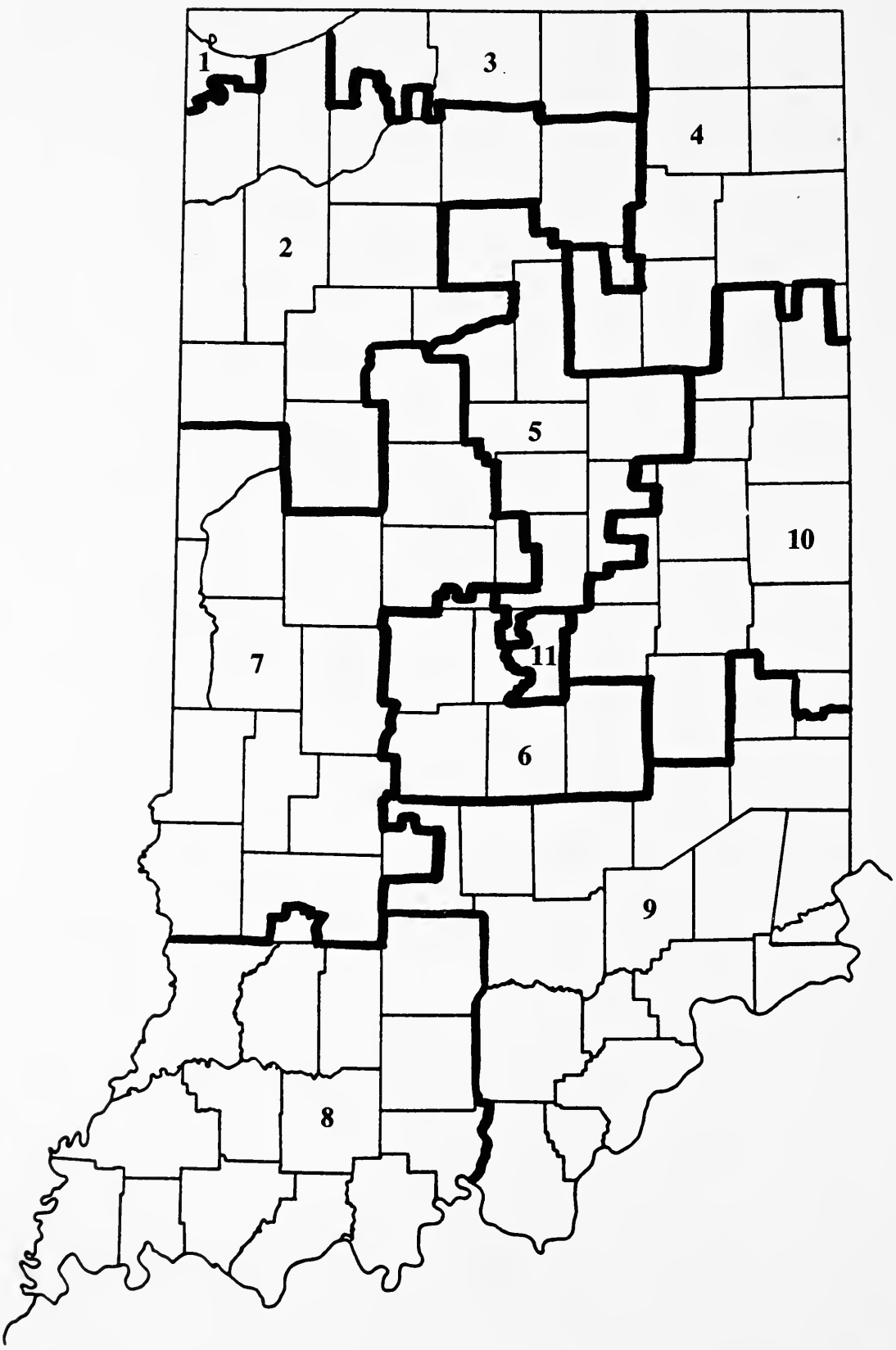
The Feldman Plan



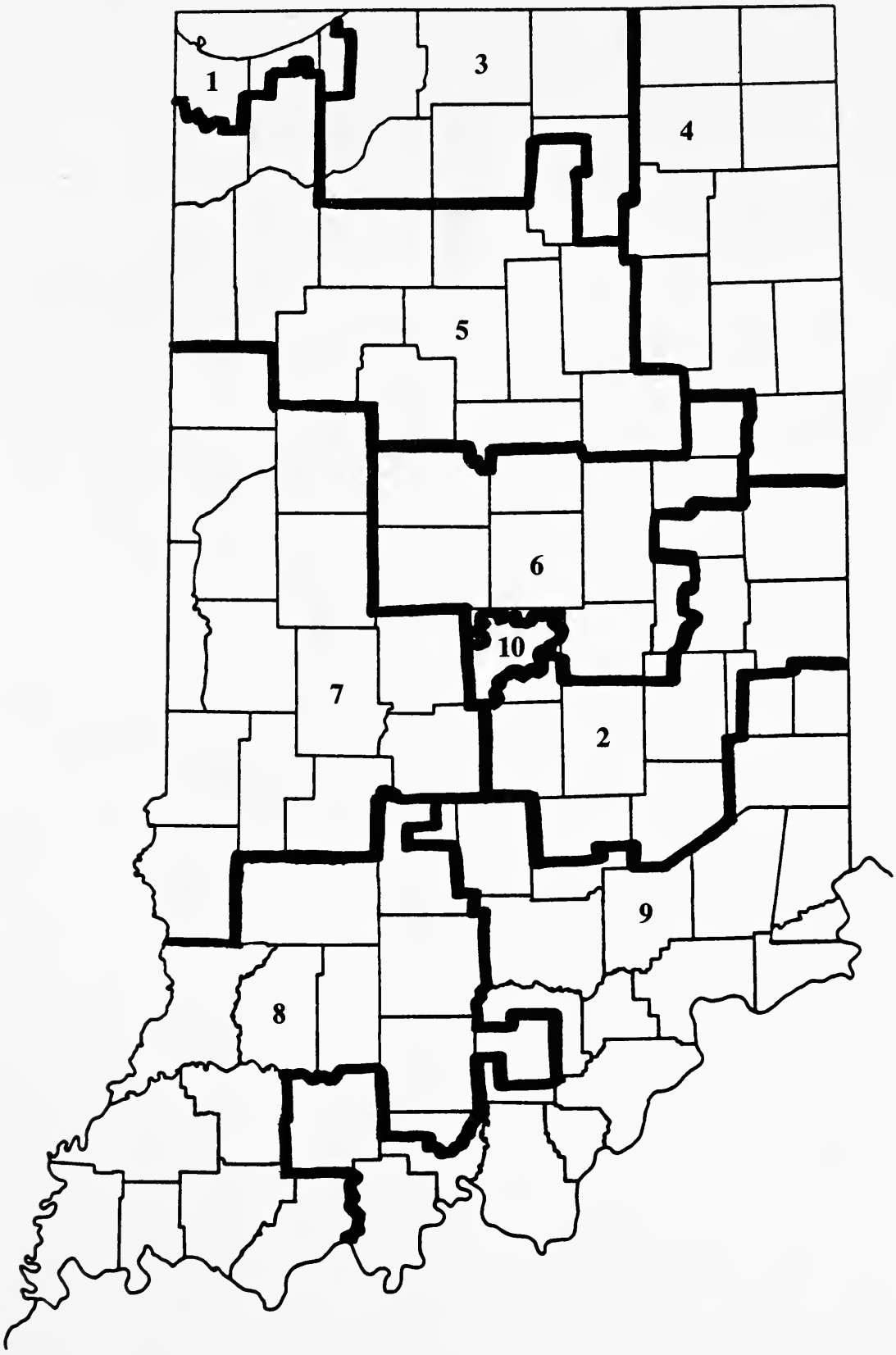
APPENDIX B:

Congressional Districts of the 1970's



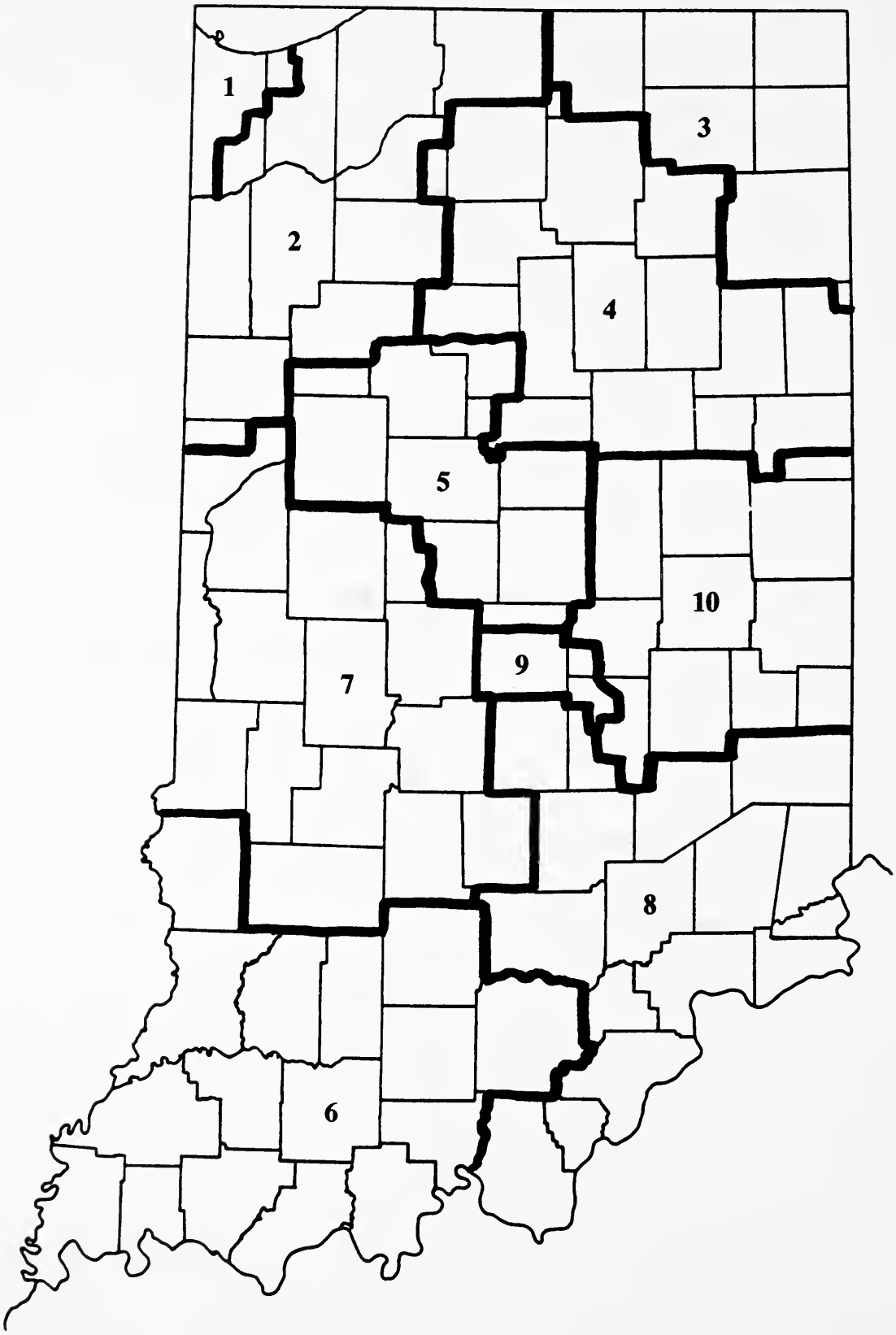
APPENDIX C:

The Sutherlin Plan



APPENDIX D:

The Author's Plan



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Indiana Law Review	9 6 6 7 0 0	9/28/83
3. FREQUENCY OF ISSUE	**3A. NO. OF ISSUES PUBLISHED ANNUALLY**	**3B. ANNUAL SUBSCRIPTION PRICE**
Four times yearly, Jan.,Mar., Apr., June.	4	$15.00

4. COMPLETE MAILING ADDRESS OF KNOWN OFFICE OF PUBLICATION *(Street, City, County, State and ZIP Code) (Not printers)*

Indiana Law Review
735 W. New York Street, Indpls, In 46202

5. COMPLETE MAILING ADDRESS OF THE HEADQUARTERS OF GENERAL BUSINESS OFFICES OF THE PUBLISHER *(Not printer)*

Indiana Law Review
735 W. New York Street, Indpls, In 46202

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